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Supreme Court, U.S.
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No. _____ (1)

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In The
Supreme Court of the United States

JOHN CRANE INC.,

Petitioner,

v.

WANDA T. JONES,
ADMINISTRATRIX OF THE ESTATE OF
GARLAND F. JONES, JR., DECEASED,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether, under Article III, Section 2 of the United States Constitution, maritime law should be applied to wrongful death actions, based on a failure to warn, that are filed against land-based manufacturers of asbestos-containing products by private employees servicing ships in navigable waters?

This question should be answered in the negative.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, John Crane Inc. certifies that it is an indirect wholly-owned subsidiary of Smiths Group plc, a public company traded on the London Stock Exchange.

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1. John Crane Inc. v. Jones, ___ Va.. ___, 650 S.E.2d 851 (2007).

2. Jones v. John Crane Inc., Circuit Court for the City of Newport News, Virginia, Law No. 39028-PT, Amended Order, August 14, 2006.

3. Jones v. John Crane Inc., Circuit Court for the City of Newport News, Virginia, Law No. 39028-PT, Order, July 26, 2006.

4. Jones v. John Crane Inc., Circuit Court for the City of Newport News, Virginia, Law No. 39028-PT, oral ruling by Judge C. Peter Tench, February 10, 2006.

NATURE OF THE CASE AND MATERIAL PROCEEDINGS

This Petition is from a decision of the Supreme Court of Virginia, which affirmed the Circuit Court for the City of Newport News, Virginia's exercise of federal maritime jurisdiction over Plaintiff's wrongful death action in an asbestos liability lawsuit. Plaintiff, Wanda T. Jones,[1] the administratrix of the estate of her husband, Garland F. Jones, Jr. ("Decedent"), brought this action against several asbestos manufacturers and suppliers, including John Crane Inc. ("John Crane"). Plaintiff sought damages for John Crane's alleged failure to warn the Decedent of the harms of asbestos inhalation under strict liability and negligence theories of recovery. Before trial, all other defendants were dismissed, leaving John Crane as the sole defendant at trial.

Prior to trial, John Crane moved the trial court to apply Virginia law, rather than federal maritime jurisdiction, as invoked by Plaintiff in her Motion for Judgment. On February 10, 2006, Judge Charles P. Tench, at the pre-trial conference hearing, denied John Crane's motion and noted John Crane's timely exception to said ruling.

Thereafter, the trial was held daily from July 6, 2006 through July 26, 2006, excluding weekends, before a jury in the Circuit Court of Newport News,

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[1] John Crane has learned that Ms. Jones passed away shortly before the Supreme Court of Virginia issued its opinion. As John Crane is unaware of the identity of Ms. Jones' personal representative, it will refer to her in this Petition as the "plaintiff," as she was the only plaintiff at trial.

Virginia. The jury awarded Plaintiff $10,400,000, and found John Crane to be 34% at fault. The jury awarded $10,000,000 in compensatory damages and $400,000 in medical and funeral expenses. Because the jury's award exceeded the ad damnum clause of Plaintiff's Amended Motion for Judgment, the trial court sua sponte reduced the judgment to $10,000,000.

Subsequent to trial, in post-trial motions heard on August 14, 2006, Judge Tench reaffirmed his pre-trial rulings, including his denial of John Crane's motion to apply Virginia law. On that day, the trial court entered an Amended Order imposing judgment against John Crane in the amount of $3,400,000, "such amount being the 34% share of the total jury award assigned by the jury" to John Crane. (Amended Order, August 14, 2006). John Crane appealed the trial court's judgment to the Supreme Court of Virginia on the grounds that the trial court had improperly asserted maritime jurisdiction under the existing case law of this Court, the Court of Appeals for the Fourth Circuit, and the Supreme Court of Virginia. John Crane also appealed the trial court's judgment on three issues arising out of state law, none of which is appealed in this Petition. On September 14, 2007, the Supreme Court of Virginia, in a written opinion, affirmed the trial court's judgment on all issues, including the application of maritime law to the facts of this dispute. John Crane Inc. v. Jones, ___ Va. ___, 650 S.E.2d 851 (2007).

CONSTITUTIONAL PROVISION AT ISSUE

1. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;...—to all Cases of admiralty and maritime jurisdiction". U.S. CONST. art. III, § 2, cl. 1.

STATEMENT OF FACTS

The facts of the case are substantially not in dispute. Plaintiff's decedent, Garland F. Jones, Jr., was employed as a machinist at the Newport News Shipbuilding and Drydock Company from 1963 to 1967. There, between 1963 and 1965, Mr. Jones worked on the construction of the aircraft carrier U.S.S. America while it was in navigable waters. He was neither a sailor nor a merchant mariner, but rather was a private citizen working as an employee of the private shipyard. The evidence presented demonstrates that, during his employment, Mr. Jones had been exposed to a variety of asbestos-containing products, including gaskets and packing material that had been manufactured by John Crane.

Forty years later, after he was no longer employed at the shipyard, or working in any other manner connected to navigable waters, Mr. Jones contracted a rare form of cancer, mesothelioma, which he attributed to his exposure to asbestos. There was no dispute as to the diagnosis. Mr. Jones died of mesothelioma on July 26, 2005, at the age of 61.

This case was filed in the spring of 2005. On February 10, 2006, the trial court held a hearing to decide several pretrial motions. One issue decided was whether maritime law or Virginia law should be applied to this case. (Jones TR, 2/10/06 pp. 2-11). Both parties briefed the issue, the determination of which was crucial because maritime law and Virginia law differ radically in regard to the elements of and measure of damages recoverable in

a wrongful death action. Under maritime law, but not Virginia law, Plaintiff was permitted to recover damages for pain and suffering.[2] Another important question dependent on the choice between maritime and Virginia law was the applicable standard of care: whether John Crane would be held to the Virginia standard that it "knew or had reason to know" of the dangers of asbestos, or the maritime standard, "knew or should have known." The trial court ruled in favor of Plaintiff and applied maritime law. (Jones TR, 2/10/06 pp. 10-11).

In so ruling, the trial court stated that it was following the precedent established by the Supreme Court of Virginia in Garlock Sealing Technologies v. Little, 270 Va. 381, 620 S.E.2d 773 (2005) [hereinafter Little]. (Jones TR, 2/10/06 p. 11). John Crane's exception was noted by the trial court. (Jones TR, 2/10/06 p.10). John Crane concedes that once maritime jurisdiction had been asserted by the trial court, it was proper to apply the "should have known" standard of care to its conduct. At trial, the jury was instructed on the "should have known" standard of care, and returned a verdict in favor of Plaintiff. The jury awarded $3,400,000 in compensatory damages including pain and suffering, an element of damages which would not have been permitted under Virginia law.

Under Virginia principles of jurisprudence, no intermediate appeal of right was available to John

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[2] Plaintiff was permitted to recover damages for pain and suffering in addition to the damages authorized by § 8.01-52, Code of Virginia, 1950, as amended. See Sea-Land Servs. v. Gaudet, 414 U.S. 573, 583 (1974); Jones, 650 S.E.2d at 853 n.3.

Crane. Therefore, John Crane timely petitioned the Supreme Court of Virginia for an appeal, citing as one of its assignments of error "[t]he trial court erred in applying admiralty jurisdiction and general maritime law rather than Virginia law." John Crane's petition was granted, and the parties briefed and argued the appeal before a full panel of justices. The Supreme Court of Virginia's opinion of September 14, 2007, held that maritime jurisdiction was properly applied, because the inhalation of asbestos has a potentially disruptive impact on maritime commerce and because John Crane's manufacture of asbestos-containing products had a substantial relationship to traditional maritime activity. John Crane Inc. v. Jones, ___ Va. ___, 650 S.E.2d 851, 854 (2007). The judgment was timely satisfied. John Crane now petitions this Court to determine whether maritime law should be applied in an asbestos-related wrongful death action against a land-based manufacturer of gaskets and packing alleged to have caused injury by virtue of a failure to adequately warn employees of a private shipyard servicing ships on navigable waters.

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITIES

John Crane respectfully asks this Court to determine whether its most recent maritime jurisdiction decisions, Sisson v. Ruby, 497 U.S. 358 (1990), and Grubart v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995), and tests articulated therein, require that a previously consistent line of federal appellate cases, holding maritime jurisdiction to be unavailable to shipyard workers in asbestos cases, be overruled as well. Analysis of past rulings of the Courts of Appeals, and of this Court, reveals that shipyard workers claiming asbestos injury cannot sue under maritime jurisdiction under the law of the Fourth Circuit and various other Circuits. See Oman v. Johns-Manville Corp., 764 F.2d 224, 230 (4th Cir.) (en banc), cert. denied, Oman v. H.K. Porter, 474 U.S. 970, 106 S.Ct. 351 (1985). Though the Fourth Circuit's test for applying maritime jurisdiction was disapproved by this Court for being too fact-specific, the result in Oman and its brethren is valid under this Court's current test as articulated in Sisson and Grubart. Moreover, the Supreme Court of Virginia's decision conflicts with Sisson and Grubart, because its decision improperly applied the "disruptive impact" and "substantial relationship" factors of the nexus test.

I. Existing Federal Precedent Holds that Maritime Jurisdiction is Not Applicable to Shipyard Workers in Asbestos Claims.

By 1985, the federal Courts of Appeals widely viewed maritime jurisdiction as unavailable to

shipyard workers in asbestos actions. See Oman, supra; Woessner v. Johns-Manville Sales Corp., 757 F.2d 634, 649 (5th Cir. 1985); Myhran v. Johns-Manville Corp., 741 F.2d 1119, 1123 (9th Cir. 1984); Harville v. Johns-Manville Products Corp., 731 F.2d 775, 787 (11th Cir. 1984); Lowe v. Ingalls Shipbuilding, 723 F.2d 1173, 1190 (5th Cir. 1984); Austin v. Unarco Industries, Inc., 705 F.2d 1, 14 (1st Cir. 1983); Keene Corp. v. United States, 700 F.2d 836, 844-45 (2d Cir. 1983), cert. denied 464 U.S. 864, 104 S.Ct. 195 (1983); Owens-Illinois v. United States District Court, 698 F.2d 967, 971 (9th Cir. 1983). This interpretation was based on this Court's decision in Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249 (1972), to add to the simple "locality test"[3] by requiring analysis of the nature of the wrong. Oman, 764 F.2d at 227. Executive Jet and the subsequent opinion in Foremost Insurance Co. v. Richardson, 457 U.S. 668, 674 (1982), required a court asserting maritime jurisdiction to find (1) that the injury took place on maritime water (the "locus" requirement), and (2) that the tortfeasor's actions bore a "significant relationship to traditional maritime activity" (the "nexus" requirement). Executive Jet, 409 U.S. at 255-56.

Courts applying the Executive Jet and Foremost test applied a wide range of reasons why the nexus test is not met in cases like the one at bar. In considering the nexus prong as applied to shipyard workers allegedly exposed to asbestos

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[3] I.e., basing the decision whether to apply maritime jurisdiction merely on the location of the injury. See, e.g., The Plymouth, 70 U.S. (3 Wall) 20, 35-36 (1866).

insulation, the Fourth Circuit in Oman noted that an overemphasis on the work performed by shipyard workers, as opposed to the nature of the alleged wrong committed by the tortfeasor, was responsible for that court's previous rulings supporting admiralty jurisdiction over the workers' claims. Oman, 764 F.2d at 229. Moreover, shipyard workers do not perform activities traditionally done by sailors, meaning that their injuries "do not implicate maritime concerns and are not unique to seamen." Id.; see also Woessner, 757 F.2d at 644, Myrhan, 741 F.2d at 1122, Harville, 731 F.2d at 784-85, Austin, 705 F.2d at 12, Owens-Illinois, 698 F.2d at 970-71. The injuries suffered by the plaintiffs, while serious, were also lacking in maritime character and were indistinguishable from those suffered by similarly-situated land-based plaintiffs. See Woessner, 757 F.2d at 647, Harville, 731 F.2d at 785; see also Owens-Illinois, 698 F.2d at 971 ("Both the injury and its cause are far more closely affiliated with the clearly land-based negligence arising in the construction industry generally than with negligence taking place in commerce and navigation on the navigable waters"). Dispensing with the notion that the importance of the plaintiffs' activities to maritime commerce was enough to satisfy the nexus requirement, some courts held that the activity itself must be of a maritime nature to militate toward the application of admiralty law. Woessner, 757 F.2d at 644, Harville, 731 F.2d at 784.

Important to the analysis of some courts was the wide range of uses for the asbestos products at issue, which were not designed specifically for

maritime use. Woessner, 757 F.2d at 643, Harville, 731 F.2d at 784, Keene, 700 F.2d at 844; see also Owens-Illinois, 698 F.2d at 971 (distinguishing between asbestos products, which do not have maritime attributes, with navigational and safety equipment, which have a clear relationship to maritime activity). The involvement of vessels, which would generally seem to implicate maritime concerns, is "at most tangential" in these cases. Woessner, 757 F.2d at 646, Myrhan, 741 F.2d at 1122, Harville, 731 F.2d at 785. Several courts focused on the fact that whether the case eventually was won by the plaintiff or defendant, it would not have "any more than the most attenuated impact on maritime commerce." Oman, 764 F.2d at 229, see also Harville, 731 F.2d at 786.

Courts also gave several policy reasons as to why maritime jurisdiction should be disfavored in shipyard asbestos cases. First, there is "no unique federal interest in uniform treatment of asbestos claims," which would justify the displacement of state law with federal law. Woessner, 757 F.2d at 648, Myrhan, 741 F.2d at 1122, Harville, 731 F.2d at 786, see also Austin, 705 F.2d at 13 (holding that the denial of maritime jurisdiction would not burden the administration of justice or the flow of maritime commerce). Conversely, states would have an interest in having their tort law uniformly applied to workers performing identical duties, regardless of whether their work was supported by land or water. See Woessner, 757 F.2d at 649, Lowe, 723 F.2d at 1189-90, Austin, 705 F.2d at 13. There is nothing about these cases that requires the "special expertise

of a court sitting in admiralty as to navigation or water-based commerce." Myrhan, 741 F.2d at 1122. Nor is there a "peculiar hazard of the sea and a vessel's equipment" to shipyard workers installing asbestos products. Austin, 705 F.2d at 13.

As to the argument that defective products would have an impact on commerce, the Fourth Circuit was careful to distinguish between defects in the products, and defects in the components of the products. Oman, 764 F.2d at 229. The insulation itself did not cause the plaintiffs' injuries, but rather the asbestos fibers contained within the insulation. Id. Those fibers had no connection with maritime activity other than that they were used in a product that happened to be used aboard ship. Id. On the other hand, had the asbestos itself been defective – for example, if it had caused a fire and destroyed the ship – then maritime jurisdiction could validly be asserted because maritime concerns would have been invoked. Id. Thus, the character of the defendant's activity causing injury was considered to be the incorporation of injury-causing asbestos in its product, as opposed to the manufacturing of a product whose malfunction caused damage aboard the ship and harmed maritime commerce. See Oman, 764 F.2d at 229. The Fourth Circuit in Oman refused to apply a requirement that materials be advertised as "maritime products" for maritime jurisdiction to lie, adding that under such a requirement, "the nexus test would be met with some products whose use in maritime commerce is important but which do not raise the traditional

maritime concerns discussed in Executive Jet."[4] Oman, 764 F.2d at 229-30.

II. This Court's Decisions in Sisson and Grubart Did Not Disturb the Results in Oman and its Brethren.

In her arguments to the Supreme Court of Virginia, Plaintiff claimed that Oman was overruled by this Court, first in Sisson, then in Grubart. The Supreme Court of Virginia evidently agreed with Plaintiff.[5] Although this Court in Sisson declined to adopt a four-factor test employed by the Fourth

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[4] Such traditional maritime concerns include collisions at sea, unseaworthiness, maintenance and cure, maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, claims for salvage, and injuries to seamen. Executive Jet, 409 U.S. at 254, 270.

[5] Indeed, the Supreme Court of Virginia did not even mention Oman in its analysis. Jones, 650 S.E.2d at 853-55. It instead cited as persuasive authority a handful of cases that either are from federal district courts or have nothing to do with asbestos. These included a Southern District of Indiana decision where the plaintiff was a boiler technician stationed at sea (Lambert v. Babcock & Wilcox, Co., 70 F.Supp.2d 877 (S.D.Ind. 1999)); a Northern District of Ohio case involving John Crane where the plaintiff was a merchant seaman (Bartel v. A-C Product Liability Trust, 461 F.Supp.2d 600 (N.D.Ohio 2006)); a Seventh Circuit case where the plaintiff was immediately injured while lifting a heavy object aboard a riverboat casino (Weaver v. Hollywood Casino-Aurora, Inc., 255 F.3d 379 (7th Cir. 2001)); an Eleventh Circuit case where the plaintiff was immediately injured after slipping on oil (Alderman v. Pacific Northern Victor, Inc., 95 F.3d 1061 (11th Cir. 1996)); and a Fifth Circuit case where the plaintiff injured his knee in an explosion (Coats v. Penrod Drilling Corp., 61 F.3d 1113 (5th Cir. 1995)). See Jones, 650 S.E.2d at 854.

Circuit in Oman,[6] the result in Oman and the host of other federal appellate decisions should remain the same.

A. Sisson

In Sisson, a fire erupted in the washer/dryer unit of defendant Sisson's vessel, which eventually destroyed that and several other neighboring vessels docked in the same marina. Sisson, 497 U.S. at 360. In determining which criteria to use for the nexus test in applying maritime jurisdiction, this Court noted the Executive Jet and Foremost concept that when a "(1) potential hazard to maritime commerce arises out of (2) activity that bears a substantial relationship to traditional maritime activity...admiralty jurisdiction is appropriate." Id. at 362 (citing Foremost, 457 U.S. at 675, n.5) (numerals added for clarity). In assessing the first nexus prong, this Court stated it "must assess the general features of the type of incident involved to determine whether such an incident is likely to disrupt commercial activity." Sisson, 497 U.S. 363. Because the general features of the incident involved in that case – "a fire on a vessel docked at a marina on navigable waters" – clearly had the potential to disrupt commercial maritime activity, this Court held that the first nexus prong was satisfied. Id.

As to the second nexus prong, this Court held that, first, it "must define the relevant activity." Id.

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[6] The test required the Fourth Circuit to consider "(1) the functions and roles of the parties; (2) the types of vehicles and instrumentalities involved; (3) the causation and the type of injury; and (4) traditional concepts of the role of admiralty law." Oman, 764 F.2d at 230.

at 364. This definition is determined "not by the particular circumstances of the incident, but by the general conduct from which the incident arose." Id. Confining its inquiry to the general character of the activity giving rise to the incident allows the court to decide a jurisdictional issue without deciding, to some extent, the merits of causation. Sisson, 497 U.S. at 364. Thus, this Court did not perforce determine either the actual cause of the fire, or specifically the "activity" in which Sisson had been engaged, but instead defined the relevant activity as "the storage and maintenance of a vessel at a marina on navigable waters." Id.

Finally, in Sisson this Court ruled that a court addressing the application of maritime law must determine whether the relevant activity has a substantial relationship to a "traditional maritime activity".[7] Id. at 365. In this part of its analysis, this Court interposed a lengthy footnote discussing "this aspect of the jurisdictional inquiry" as it had previously been treated by the various Circuits, including the Fourth Circuit in Oman. Id. at 365, n.4. At the end of the footnote, this Court stated that "the formula initially suggested by Executive Jet and more fully refined in Foremost and in this case provides appropriate and sufficient guidance to the federal courts. We therefore decline the invitation to use this case to refine further the test we have developed." Id. at 365, n.4.

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[7] This Court found that the storage and maintenance of a vessel at a marina on navigable waters is substantially related to "traditional maritime activity" and ruled that maritime jurisdiction was proper. Sisson, 497 U.S. at 367.

The only part of the jurisdictional test used in Oman to which this Court has afforded anything approaching negative treatment is the "substantial relationship" prong of the nexus test.[8] Moreover, the four-factor "substantial relationship" test pronounced in Oman is hardly bad law. This Court merely declined to make the law of the Fourth Circuit its own, choosing instead to let the Circuits apply their own rationale using the general facets of the newly-refined Foremost test as their guide. This conclusion is borne out by the Fourth Circuit's statement in the post-Sisson case Price v. Price, 929 F.2d 131, 135 (4th Cir. 1991), that an examination of the Oman factors is "still an acceptable systematic method for making the analysis." The principal effect that Sisson had on existing Fourth Circuit law was to require the latter court to "project more generally the composite genre of the tort or its essential elements and determine whether traditional maritime commerce will be affected." Id.

Accordingly, the second nexus prong must be treated in a more general fashion, without focusing on the particular facts of the case. Regardless of Plaintiff's arguments to the contrary, a more general consideration of the "substantial relationship" prong

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[8] It is not entirely clear that Sisson was meant to apply to cases such as the instant one, where the relevant entities were not engaged in the same activity. See Sisson, 497 U.S. at 365 n.4 ("We believe that, at least in cases in which all of the relevant entities are engaged in similar types of activity, the formula initially suggested by Executive Jet and more fully refined in Foremost and in this case provides appropriate and sufficient guidance to the federal courts.") John Crane was not, and has never been, engaged in shipbuilding or ship repair, as Mr. Jones was when he was exposed to John Crane products.

than the one used in Oman would not likely result in a diametrically opposed result as to the applicability of maritime jurisdiction to asbestos shipyard workers from that reached by a virtual consensus of federal appellate courts before Sisson. Rather, it merely reinforces the propriety of the Oman decision, as more fully set forth in Section III, infra.

B. Grubart

Likewise, this Court's decision in Grubart v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995), does nothing to bolster the Supreme Court of Virginia's implicit suggestion that the result reached in Oman was somehow overruled by Sisson. In Grubart, this Court clarified its earlier holding in Sisson, and confirmed that the tortfeasor's activity is the primary focus in determining whether admiralty jurisdiction lies. 513 U.S. at 541. In Grubart, Great Lakes had driven pilings from its barge into the Chicago riverbed, thereby weakening the tunnel structure that the City of Chicago had not properly maintained, and causing the Chicago River to flood into the tunnels and basements in downtown Chicago. Id. at 530. Thus, there were two tortfeasors whose conduct was at issue.

In Grubart, this Court expressly rejected the City's argument that Sisson required the Court to consider the City's own inaction, which, because of its failure to resemble any traditional maritime activity, would take the suit out of admiralty. Id. at 540-541. In rejecting the argument, the Court reasoned that: "The city misread Sisson, however, which did not consider the activities of the washer/dryer manufacturer, who was possibly an

additional tortfeasor, and whose activities were hardly maritime." Id. at 541. Rather, in Grubart, the Court explained that, in Sisson, the activities of the boat owner "supplied the necessary substantial relationship to traditional maritime activity" in that case, and only one tortfeasor need be connected to maritime activity. Id. Importantly, neither the washer/dryer manufacturer in Sisson, nor the plaintiffs, provided such relationship. Grubart, 513 U.S. at 540-541. Thus, the Court in Grubart ruled that even if it were to identify the "activity giving rise to the incident" as including the acts of the City, which alone would not have provided a sufficient relation to maritime activity, admiralty jurisdiction would still attach due to the activities of the other defendant in the case. Id.

Significantly, nowhere in Grubart does this Court suggest that its decision is meant to change the law of maritime jurisdiction. On the contrary, this Court made sure to note that the entirety of its post-Executive Jet decisions has been to clarify the applicable test:

> [t]his Court has not proposed any radical alteration of the traditional criteria for invoking admiralty jurisdiction in tort cases, but has simply followed the lead of the lower federal courts in rejecting a location rule so rigid as to extend admiralty to a case involving an airplane, not a vessel, engaged in an activity far removed from anything traditionally maritime.

Grubart, 513 U.S. at 542. It also articulated a disapproval of four- or seven-factor tests for the "substantial relationship" prong, because

> the case law has...carved out the approximate shape of admiralty jurisdiction in a way that admiralty lawyers understand reasonably well...the proposed four- or seven-factor test would be hard to apply, jettisoning relative predictability for the open-ended rough-and-tumble of factors, inviting complex argument in a trial court and a virtually inevitable appeal.

Grubart, 513 U.S. at 547. From this language, it is clear that this Court considered maritime jurisdictional concerns to be relatively well-settled and that the impracticality of applying the multifactor tests was the reason for its disapproval.

> A state-court decision is "contrary to" this Court's clearly established law if it "applies a rule that contradicts the governing law set forth in the Court's cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at" a different result.

Price v. Vincent, 538 U.S. 634, 634-35 (2003). At the time Grubart was decided, the pre-existing jurisprudential framework for applying maritime jurisdiction included the Oman result, if not its

somewhat impractical four-factor test. John Crane contends that this Court did not intend to discard a well-settled law of maritime jurisdictional application – that it does not apply to shipyard workers exposed to asbestos – and leave in its place a brand new framework of analytical algorithms likely to introduce undesirable uncertainty and excessive litigation into the already-convoluted world of shipyard asbestos cases. In any event, the same result should obtain under Sisson and Grubart.

III. The Supreme Court of Virginia's Application of Maritime Law in this Shipyard Worker Case Conflicts With this Court's Rulings in Sisson and Grubart.

The Supreme Court of Virginia's decision conflicts with this Court's rulings in Sisson and Grubart. A plaintiff shipyard machinist seeking to recover for asbestos disease suffered as a result of work on harbored Navy ships cannot satisfy either the "potential hazard to maritime commerce" or "substantial relationship" prongs of the nexus test.

A. Mr. Jones' Injury Was Sustained on Navigable Waters, Satisfying the Locus Test.

The first part of the jurisdictional analysis is a determination of whether the tort occurred on navigable waters or an injury on land was caused by a vessel on navigable waters. Grubart, 513 U.S. at 534. Without conceding that Mr. Jones's alleged

exposure to asbestos occurred on a navigable waterway, for purposes of this Petition, John Crane is willing to stipulate that the locus prong of the jurisdictional test is satisfied.

B. Neither Prong of the Nexus Test is Satisfied.

i. The General Features of Mr. Jones's Exposure to Asbestos Products Do Not Have a Potentially Disruptive Impact on Maritime Commerce.

Under the connection test, a court must first "'assess the general features of the type of incident involved' to determine whether the incident has a 'potentially disruptive impact on maritime commerce.'" Grubart, 513 U.S. at 534 (citing Sisson, 497 U.S. at 363-365). In other words, the court must determine "whether the incident could be seen within a class of incidents that posed more than a fanciful risk to commercial shipping," Id. at 539, as the "protection of maritime commerce is the primary focus of admiralty jurisdiction." Foremost, 457 U.S. at 674. The incident at issue here was insufficient to create a maritime connection.

Although it correctly identified Grubart in its analysis of the first nexus prong, the Supreme Court of Virginia mistakenly stated that the impact of the incident should be evaluated "at an intermediate level of possible generality." Jones, 650 S.E.2d at 854. The law is that the incident itself must be accorded an intermediate level of generality. There is a crucial difference, as illustrated by the lower

court's further analysis. The Supreme Court of Virginia quixotically defined the "incident giving rise to Garland Jones' injury" as "inhalation of asbestos". Jones, 650 S.E.2d at 853-54. However, the lower court evidently believed that its definition of the incident was not what should be analyzed, but that it should instead consider the impact of that incident, articulated as "the general category of the risks of unsafe working conditions that have a potential impact on commercial shipping." Jones, 650 S.E.2d at 854. This ruling conflicted with this Court's dictates in Sisson and Grubart.

By evaluating the perceived impact at an extremely general level, the lower court answered its question before it was even asked. The Supeme Court of Virginia should have properly defined the character of the incident itself, cast it in a class of general incidents, and proceeded to analyze that class's potential effect on maritime commerce. Only this logical framework should have been used, and the court's faulty process renders its conclusion improper.

In this case, the "incident" giving rise to Plaintiff's injury should have been described in general terms as "the inhalation of asbestos fibers while installing asbestos-containing products on a Navy ship docked in navigable waters." Inhalation of asbestos aboard a Navy ship, whether during new construction or repair, has nothing more than a fanciful potential to disrupt maritime commerce. See, e.g., Owens-Illinois, Inc., 698 F.2d at 970 (holding that new ship construction does not have the "maritime flavor" necessary to invoke admiralty

jurisdiction). A shipyard worker's exposure to asbestos does not inevitably lead to health problems, and the long latency period of asbestos disease means that there is no consequence to maritime commerce at the time of the incident, or within any period of time immediately thereafter. Nor does a shipyard worker's contraction of asbestos-related disease decades later disrupt maritime activity at the time the disease is contracted. The incident of inhaling asbestos fibers aboard a docked U.S. Navy ship simply does not pose a threat to traditional maritime activities or maritime commerce. Accordingly, the first prong of the nexus test was not satisfied, and the lower courts erred in concluding to the contrary.

ii. John Crane's Activity Giving Rise to the Incident Did Not Have a "Substantial Relationship to Traditional Maritime Activity."

In determining the second part of the nexus test, the Court must decide whether the defendant's "activity" that caused the plaintiff's injury bore a "substantial relationship to traditional maritime activity." Grubart, 513 U.S. at 539. A tortfeasor's activity, commercial or noncommercial, on navigable waters must be "so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the suit at hand." Id. Defining the "activity" in a nexus analysis is separate from

defining the "incident" that it caused.[9] Id. at 540. The "actions" giving rise to the incident are defined

[9] The "substantial relationship" prong is sometimes improperly conflated with the "disruptive impact" prong. For example, in Garlock Sealing Technologies v. Little, 270 Va. 381 (2005), the decedent had been a submarine repairman whose work included installing and replacing gaskets on submarines. His estate brought a wrongful death action against the manufacturers of the material used to create the gaskets, claiming the gasket material caused decedent's mesothelioma. Plaintiff argued that maritime law applied. Id. at 384. Defendant Garlock, asserted in response that there was "no relationship between the alleged tort of negligent failure to warn and/or breach of warranty by an asbestos product manufacturer and traditional maritime activity." Id. at 386. The trial court agreed with the plaintiff and applied maritime law.

On appeal, the Supreme Court of Virginia affirmed. Id. Citing Sisson for the proposition that "the relevant activity is determined by the general conduct from which the incident arose," the Court labeled "ship repair" - and more specifically the "installation and maintenance of... gaskets" - as the relevant "activity." Id. This reasoning was incorrect, because it is the tortfeasor's, or "wrongdoer's" activity, and not the activities of the plaintiff, that is material to the analysis. The Little opinion did not engage in a detailed analysis of the law and facts relevant to the Court's "nexus" determination. Little, 270 Va. at 386. Rather, the Court offered the statement that "[t]he installation and maintenance of these gaskets was necessary to enable the submarines to operate properly." Id.; see also Jones, 650 S.E.2d at 854 (quoting Little for this proposition). This statement reveals that the Court was focused on the "activities" of the plaintiff and the "incident" of installing the gaskets, instead of the "activity" of the tortfeasor, Garlock, that proximately caused the decedent's illness and death. The Supreme Court of Virginia mistakenly followed its previous erroneous decision in Jones. Thus, the Supreme Court of Virginia effectively applied two "disruptive impact" prongs and ignored the "substantial relationship" prong. Compare Mizenko v. Electric Motor and Contracting Co., 244 Va. 152 (1992), where the Supreme Court of Virginia correctly found that the relevant activity was ship repair where the defendant was a subcontractor whose employees were working alongside the plaintiff and injured him. Unlike in Little and the instant case, the defendant's activity was ship repair.

by the tortfeasor's activities that proximately caused the incident. Grubart, 513 U.S. at 541. The relevant activity is defined "not by the particular circumstances of the incident, but by the general conduct from which the incident arose." Sisson, 497 U.S. at 364.

When the relationship between the tortfeasor's activity and traditional maritime concerns is too attenuated, as it was here, admiralty jurisdiction is unavailable. See id. at 540. John Crane's relevant activity was the failure to warn of the use of asbestos fibers in its products that were placed into the stream of commerce for use by the Decedent. The elimination of maritime concerns from this definition is appropriate, because there is nothing particularly maritime about the use of asbestos fibers in fabricating gaskets and packing material. Although it is true that some gaskets and packing inevitably are purchased for use aboard Navy ships, their use aboard those ships does not differ in any material respect than the many land-based uses of the same products.

It was John Crane's alleged failure to warn that its products contained asbestos that gave rise to Mr. Jones' inhalation of asbestos fibers aboard Navy ships, not any relationship that John Crane's conduct had with maritime activity. See Foremost, 457 U.S. at 674; Executive Jet, 409 U.S. at 254, 270 (observing that activities related to navigation, seaworthiness, cargo damage and maintenance and cure are traditional maritime activities). John Crane is most closely situated to the washer/dryer manufacturer in Sisson, who undertook "activities"

with absolutely no connection to traditional maritime activity. Grubart, 513 U.S. at 540-541. Therefore, just as if the plaintiffs in Sisson had brought suit solely against the washer/dryer manufacturer, or if plaintiffs in Grubart had brought suit solely against the City of Chicago, maritime law should not have been applied. To find the "substantial relationship" prong satisfied in this case would cast the possibility of federal maritime jurisdiction on any manufacturer whose product might eventually find its way aboard a vessel. John Crane submits that such an expansion of maritime jurisdiction undermines the very purposes of the tests formulated and applied by this Court in Sisson and Grubart..

Furthermore, it was not the defective nature of the products themselves that caused Mr. Jones' injury, but the failure to warn of the use of asbestos fibers in those products. Use of asbestos fibers is hardly maritime in nature. As the Fourth Circuit stated in Oman, "the injuries produced by these fibers [do not] raise the same maritime concerns as the injuries caused by the malfunctioning steel shaft, the defects in the engine, or the defects in the fuel filter." Oman, 764 F.2d at 229.

In its argument to the Supreme Court of Virginia, Plaintiff noted that John Crane had advertised some asbestos products for use in maritime applications. This is true; John Crane marketed gaskets and packing material for the marine industry and advertised its products for marine engine and general ship use, along with a broad range of other industrial applications. See

Jones, 650 S.E.2d at 855. The Supreme Court of Virginia was so persuaded by Plaintiff's argument and the support in the record that it based its entire analysis of the "substantial relationship" factor on this point and ignored all others, stating that these advertisements "bore a substantial relationship to traditional maritime activities." Id. at 855.

The Supreme Court of Virginia's improper conclusion conflicts with this Court's pronouncements in Sisson and Grubart in two important respects. First, John Crane's advertisements were not the general conduct from which the incident arose. John Crane was not sued for its advertisements, but for failing to warn about the use of asbestos in products placed into the stream of commerce. A shipyard worker working on a Navy ship inhales asbestos, not because a manufacturer advertised its products, but because a manufacturer failed to warn about the presence of allegedly defective asbestos fibers in its products. Attributing that worker's subsequent injury to an advertisement runs afoul of this Court's caution in Sisson against determining issues of causation in the jurisdictional inquiry. Sisson, 497 U.S. at 364. It does so because it requires the trial court, as a threshold matter, to determine that the worker was exposed to asbestos because of those advertisements. There is no support in the record for the proposition that Mr. Jones was exposed to asbestos because John Crane engaged in marketing directly to the maritime industry. But even if there was such evidence, it would have been improper to rely upon that evidence for a jurisdictional inquiry, before any evidence had been taken in the case.

The second flaw in the Supreme Court of Virginia's reasoning is that advertising, in and of itself, has no connection to traditional maritime activity. Nothing in Sisson or Grubart supports the notion that "advertising to buyers associated with maritime pursuits" is itself substantially related to traditional maritime activity. It is an advertising activity. Advertising products to the maritime industry is not a traditional maritime activity, and it does not invoke particular maritime concerns. It is a direct solicitation for business from a sector of the market known to purchase goods in high volume. It does not demand the application of a set of laws meant to deal with colliding boats, piracy, or maintenance and cure. Plaintiff has a wide range of remedies available in state law; federal maritime law need not be involved. Therefore, Plaintiff's argument, accepted by the Supreme Court of Virginia, is nothing but a red herring set up to bypass the well-defined jurisdictional rules given in Foremost and its progeny.

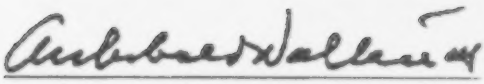
CONCLUSION

This case is unique to neither maritime service, nor traditional maritime activity. The majority of the federal courts of appeals had previously ruled that shipyard workers cannot sue asbestos manufacturers in admiralty, but the Supreme Court of Virginia has failed to follow this clear precedent. John Crane is a nationwide manufacturer of heat resistant packing and gasket products, some of which contained asbestos. John Crane's activity in manufacturing asbestos products had no significant connection with traditional maritime activity in and of itself, nor did it pose any feasible threat to maritime commerce in the 1960's. The relevant "activity" of the tortfeasor in this case was insufficient to satisfy the nexus test. The trial court erroneously applied maritime substantive law where Virginia's law should have been followed. This constituted reversible error, and a new trial under Virginia law should be ordered.

For the foregoing reasons, John Crane Inc. respectfully requests that this Court grant its Petition for Writ of Certiorari, and, upon review, vacate the judgment of the trial court entered on July 26, 2006, and amended on August 14, 2006, reverse the Supreme Court of Virginia's ruling dated September 14, 2007, and order that a new trial be conducted under the law of the Commonwealth of Virginia.

JOHN CRANE INC.

By Counsel



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APPENDIX

Present: Hassell, C.J., Keenan, Koontz, Kinser, Lemons, and Agee, JJ., and Lacy, S.J.[1]

JOHN CRANE, INC.

v. Record No. 062164

WANDA T. JONES, ADMINISTRATRIX
OF THE ESTATE OF GARLAND F. JONES, JR.

FROM THE CIRCUIT COURT OF THE CITY OF
NEWPORT NEWS, C. Peter Tench, Judge

OPINION BY SENIOR JUSTICE
ELIZABETH B. LACY
September 14, 2007

Garland F. Jones, Jr. was employed as an outside machinist at Newport News Shipbuilding & Dry Dock Company from 1963 to 1967. In January 2005, he was diagnosed with malignant mesothelioma, a fatal cancer in the lining of the lung which is caused only by exposure to asbestos dust or fibers. On March 22, 2005, Garland and Wanda T. Jones filed an amended motion for judgment against John Crane, Inc. (Crane) and other companies, alleging that Crane manufactured and/or sold asbestos-containing products to Garland Jones' employers, and that he was exposed to these products while building and repairing various

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[1] Justice Lacy participated in the hearing and decision of this case prior to the effective date of her retirement on August 16, 2007.

marine vessels.[2] The Joneses sought $10 million in compensatory damages and $5 million in punitive damages. Garland Jones died in July of 2005. Wanda Jones, as administratrix of the estate of Garland F. Jones, Jr., (the Estate) filed a second amended motion for judgment adding a wrongful death count.

Following a seven day trial, the jury returned a verdict in favor of the Estate awarding $10.4 million in damages. The jury apportioned 34 percent of the damages to Crane, and the remaining 66 percent equally between two other defendant companies. The trial court reduced the damage award to $10 million to conform to the amount sought in the motion for judgment. Crane's damage liability amounted to $3.4 million.

Crane appeals to this Court asserting that the judgment should be reversed and the case remanded on four separate grounds. Crane first assigns error to the trial court's refusal to set aside the jury verdict as excessive. In two other assignments of error, Crane challenges the trial court's evidentiary rulings regarding the testimony of a Crane employee and two of Crane's expert witnesses. Finally, Crane asserts that the trial court should have applied Virginia law, rather than general maritime law. For

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[2] In addition to John Crane, the complaint named the following parties as defendants: Garlock Sealing Technologies, LLC; Dana Corporation; Metropolitan Life Insurance Company; General Electric Company; Foster-Wheeling USA Corporation; Warren Pumps, Inc.; Goulds Pumps, Inc.; Borg-Warner Corporation; Honeywell International, Inc.; Pneumo Abex Corporation; General Motors Corporation; and Genuine Parts Company. None of these defendants are parties to this appeal.

the following reasons, we conclude that there was no error in the challenged rulings and we therefore will affirm the judgment of the trial court.

DISCUSSION

I. MARITIME LAW

We first address Crane's assertion that the trial court erred in applying general maritime law to the Estate's action.[3] Whether general maritime law applies to this case presents a question of law which we review de novo.

The application of general maritime law has evolved from a simple "location test," under which maritime law "govern[ed] only those torts occurring on the navigable waters of the United States," Victory Carriers, Inc. v. Law, 404 U.S. 202, 205 (1971), to a location and connection test, initially established in Sisson v. Ruby, 497 U.S. 358 (1990), and most recently discussed in Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995). In Grubart, the United States Supreme Court explained that a party seeking to apply maritime law to a case

> must satisfy conditions both of location and ofconnection with maritime activity. A court applying the location

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[3] Under general maritime law, the Estate was allowed to recover damages for pain and suffering in addition to the damages authorized by Code § 8.01-52 in a wrongful death action. Sea-Land Servs. v. Gaudet, 414 U.S. 573, 583 (1974).

> test must determine whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water. The connection test raises two issues. A court, first, must assess the general features of the type of incident involved, to determine whether the incident has a potentially disruptive impact on maritime commerce. Second, a court must determine whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity.

Id. at 534 (internal quotation marks and citations omitted).

As the parties recognize, the location prong of the test is met in this case because the incident giving rise to Garland Jones' injury, inhalation of asbestos, occurred while repairing and constructing ships at the Newport News Shipyards in the James River. However, according to Crane neither prong of the connection test is met because the inhalation of asbestos does not have a potentially disruptive impact on maritime commerce and because Crane's activity in the manufacture of asbestos-containing products did not have a substantial relationship to traditional maritime activity. We disagree.

In applying the first prong of the connection test the impact of the incident is evaluated "at an intermediate level of possible generality" in order to

determine whether the incident is "within a class of incidents that posed more than a fanciful risk to commercial shipping." Grubart, 513 U.S. at 538-39 (citations omitted). The disruptive impact need only be potential, not actual. Id.

Applying the test enunciated in Sisson and Grubart, other courts have concluded that exposure to asbestos came within the general category of the risks of unsafe working conditions that have a potential impact on commercial shipping. In Lambert v. Babcock & Wilcox, Co., 70 F.Supp.2d 877, 884 (S.D. Ind. 1999), the court observed that "[u]nsafe working conditions aboard a vessel have consistently been held to pose a potentially disruptive impact upon maritime commerce." The Lambert Court concluded that "asbestos exposure in the boiler room of a ship – could potentially disrupt maritime commerce by rendering the boiler room too hazardous to operate." Id. See also Bartel v. A-C Product Liability Trust, 461 F.Supp.2d 600, 602 (N.D. Ohio 2006) (claim based on merchant seaman's exposure to asbestos while aboard a vessel was governed under admiralty law); Weaver v. Hollywood Casino-Aurora, Inc., 255 F.3d 379, 386 (7th Cir. 2001) ("[W]ithout doubt an injury to . . . crew [of a "commercial boat"] disrupts its participation in maritime commerce."); Alderman v. Pacific Northern Victor, Inc., 95 F.3d 1061, 1064 (11th Cir. 1996) ("Unsafe working conditions aboard a vessel under repairs, maintenance, or conversion, therefore, pose a potentially disruptive impact upon maritime commerce."); Coats v. Penrod Drilling Corp., 61 F.3d 1113, 1119 (5th Cir. 1995) ("[W]orker injuries, particularly to those involved in repair and

maintenance, can have a disruptive impact on maritime commerce by stalling or delaying the primary activity of the vessel.").

Accordingly, we conclude that Garland Jones' inhalation of asbestos fibers while engaged in the repair and construction of vessels on navigable waters had the potential to disrupt maritime commerce. Injury to Garland Jones that occurred during these activities could potentially slow or frustrate the work being done on the vessel. Such a result could, in turn, have a disruptive impact on maritime commerce.[4]

The second prong of the connection test – whether the activity giving rise to the incident bears a substantial relationship to traditional maritime activity – requires a definition of the relevant activity "not by the particular circumstances of the incident, but by the general conduct from which the incident arose." Sisson, 497 U.S. at 364. This inquiry demands a "broad perspective." Id. In Grubart, the Supreme Court explained that this inquiry is guided by principles of proximate causation, and that "[t]here is . . . no need . . . for imposing an additional nonremoteness hurdle in the name of jurisdiction." Id. at 538.

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[4] We do not address Crane's argument that Garland Jones worked only on new ship construction which does not have a potentially disruptive impact on maritime commerce. The record shows that Garland Jones' exposure to asbestos occurred while working on new vessels and repairing existing vessels.

We applied these principles in Garlock Sealing Technologies, LLC v. Little, 270 Va. 381, 384-86, 620 S.E.2d 773, 775-77 (2005), and determined that the defendant's acts of omission and commission in manufacturing asbestos-containing material used by Little to create gaskets used on submarines "had a significant connection with maritime activity," and held that maritime law applied.

In the case now before us, Crane urges again that the manufacture and sale of asbestos-containing products into the stream of commerce is too far removed from traditional maritime activities to create the necessary relationship. Again we disagree. The record in this case reflects that during the time Garland Jones was exposed to asbestos-containing products manufactured by Crane, Crane marketed gaskets and packing material directly for the marine industry and advertised its products for "marine engine and general ship use." Crane also advertised its products in publications about maritime activity. This activity bore a substantial relationship to traditional maritime activities. The fact that Crane did not directly undertake any activity aboard a maritime vessel does not obviate this connection.

In summary, for the reasons set out above, we find that the circumstances of this case satisfied both the location and connection tests required under Grubart and therefore, the trial court did not err in applying general maritime law.

II. TESTIMONY OF TERRENCE MCNAMARA

Crane next asserts that the trial court erred in allowing the Estate to call Terrance McNamara as a witness "solely for the purpose of impeachment, when the substance of his testimony was unchallenged." McNamara was Crane's custodian of records and the designated corporate representative responsible for reviewing and certifying responses to discovery propounded upon Crane from 2000 until June 2004, including discovery in this case. A number of Crane's responses to interrogatories, submitted under McNamara's verification, were untruthful. Over Crane's objection, the trial court allowed the Estate to call McNamara as an adverse witness to impeach Crane's credibility.

Generally, we review a trial court's decision to admit or exclude evidence using an abuse of discretion standard and, onappeal, will not disturb a trial court's decision to admit evidence absent a finding of abuse of that discretion. Riverside Hosp. v. Johnson, 272 Va. 518, 529, 636 S.E.2d 416, 421 (2006). While a "trial court has no discretion to admit clearly inadmissible evidence, a great deal must necessarily be left to the discretion of the court of trial, in determining whether evidence is relevant to the issue or not." Id., 636 S.E.2d at 421-22 (internal citations omitted). "Evidence is relevant if it has any logical tendency to prove an issue in a case." Goins v. Commonwealth, 251 Va. 442, 461, 470 S.E.2d 114, 127 (1996). "[R]elevant evidence may be excluded only if the prejudicial effect of the evidence outweighs its probative value." Id.

Crane's primary complaint is based on the legal proposition that a party may not impeach his own witness. While we agree that the Estate could not call McNamara for the sole purpose of impeaching him, see Virginia Electric & Power Co. v. Hall, 184 Va. 102, 105-06, 34 S.E.2d 382, 383 (1945), this is not what occurred at trial. Rather, the Estate argued to the trial court that it intended to call McNamara in order to show the "pattern of untruthful behavior exhibited by John Crane." Such a pattern, if it existed, was relevant, to a primary issue in the case, whether Crane knew or had reason to know of the health risks posed by the asbestos-containing products it manufactured. Because McNamara's testimony concerned an improper discovery verification procedure, it tended to undermine the credibility of Crane's assertion that he employed proper procedures with respect to researching the dangers posed by asbestos or to disseminating that information and that Crane was forthcoming with regard to other statements it made. Thus, McNamara's testimony did have a "logical tendency" to prove an issue in the case, and we cannot say that it was irrelevant.

Crane further argues that, because it conceded that McNamara's actions regarding discovery were improper, McNamara's testimony did not concern any factual issues in the case, but was merely "calculated to inflame the passion and prejudices of the jury." We reject this argument because first, as stated above, McNamara's testimony was relevant to the issue of Crane's credibility, and thus did concern a factual issue in the case. Furthermore, the jury's allocation of

damages among the defendants belies any argument that McNamara's testimony unduly prejudiced Crane.

Accordingly, we conclude that the trial court did not abuse its discretion in allowing McNamara to testify.

III. TESTIMONY OF CRANE'S EXPERTS

In its third assignment of error, Crane argues the trial court erroneously interpreted the disclosure requirement of Virginia Supreme Court Rule 4:1(b)(4)(A)(i) resulting in a dramatic and unfair limitation of the expert testimony of Dr. Victor Roggli and Henry Buccigross. Rule 4:1(b)(4)(A)(i) states:

> A party may through interrogatories require any other party to identify each person whom the party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

In reviewing the trial court's decision to exclude expert testimony, we apply an abuse of discretion standard. Tarmac Mid-Atlantic, Inc. v. Smiley Block Co., 250 Va. 161, 166, 458 S.E.2d 462, 465 (1995).

A. Dr. Victor Roggli

The trial court sustained the Estate's objection to Dr. Roggli's testimony regarding his opinion on the amount of asbestos in the ambient air and its relationship to the cause of mesothelioma because this opinion was not disclosed pursuant to Rule 4:1(b)(4)(A)(i). We have not previously examined the degree of specificity required by Rule 4:1(b)(4)(A)(i). Nevertheless, any application of this rule begins with determining whether the opinion at issue was disclosed in any form. See, e.g., Griffett v. Ryan, 247 Va. 465, 468, 443 S.E.2d 149, 151 (1994) (reviewing trial court decision to allow expert testimony by first examining content of the pretrial disclosure).

Crane made the following pretrial disclosure of Dr. Roggli's testimony:

> Dr. Roggli will testify as to the pathological diagnosis and the testing performed by him and others at Duke University to determine if a mesothelioma exists. Dr. Roggli may testify as to the association between asbestos (including the various types) and the alleged disease process involving the plaintiff. Dr. Roggli may testify as to the contribution, if any, of exposures to John Crane's products and products of other companies in the causation of plaintiff's asbestos-related disease. Finally, Dr. Roggli will testify as to the burden of asbestos (including

> the various types) in plaintiff's lungs and its contribution, if any, in causing plaintiff's asbestos-related disease if any. Dr. Roggli's reports have already been or will be provided.

Crane subsequently provided the Estate with a report containing the results of Dr. Roggli's examination of tissue samples taken from Garland Jones' lungs. The report did not contain any reference to levels of asbestos in the ambient air. Crane argues that in excluding Dr. Roggli's testimony, the trial court interpreted Rule 4:1(b)(4)(A)(i) too strictly. According to Crane, Dr. Roggli's opinions including those regarding asbestos in the ambient air, were "well known" to the Estate because it questioned Dr. Roggli about the opinions during his deposition. Thus, even if the disclosures were insufficient, according to Crane, the error was cured at Dr. Roggli's deposition.

Nothing in Crane's disclosure reveals that Dr. Roggli might testify about asbestos in the ambient air. Furthermore, a party is not relieved from its disclosure obligation under the Rule simply because the other party has some familiarity with the expert witness or the opportunity to depose the expert. Such a rule would impermissibly alter a party's burden to disclose and impose an affirmative burden on the non-disclosing party to ascertain the substance of the expert's testimony. We reject this reading of Rule 4:1(b)(4)(A)(i).

Accordingly, the trial court did not abuse its discretion in ruling that Dr. Roggli's opinion

testimony regarding asbestos in ambient air was inadmissible because Crane failed to comply with the disclosure requirement of Rule 4:1(b)(4)(A)(i).

B. Henry Buccigross

Prior to trial, Crane disclosed that Buccigross would offer testimony on, among other topics, his "research and/or his testing of various asbestos insulation products," including "Unibestos" and "Kaylo," as well as his research and testing of Crane products.[5] Although the disclosure referenced a report by Buccigross on his testing of Unibestos and Kaylo, Crane admitted the report was not attached to the disclosure. The trial court refused to allow Buccigross to testify about the tests he had conducted on Kaylo and Unibestos products because the Estate had not received Buccigross' report relating to this subject. Crane assigned error to this ruling.

Crane argues, as it did to the trial court, that regardless of its failure to provide Buccigross' report, the Estate knew the substance of Buccigross' testimony because the Estate's counsel had cross-examined Buccigross "at trial about his reports going back to the '90s." Crane also pointed out that the Estate had failed to depose Buccigross or to ask Crane for representative samples of Buccigross' testimony, either of which would have allowed the Estate to ascertain the actual substance of the testimony.

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[5] 5 Unibestos and Kaylo were asbestos-containing products of other manufacturers.

Rule 4:1(b)(4)(A)(i) requires that the substance of opinions to be rendered be disclosed. Here, while Crane did disclose the topic of Buccigross' testimony, Crane did not disclose the substance of Buccigross' opinions in the disclosure or through Buccigross' report. Crane thus failed to comply with the Rule and the trial court did not err by excluding the testimony. As we stated when considering Crane's challenge to the trial court's ruling on the admissibility of Dr. Rogglio's testimony, an opponent's ability to depose an expert or familiarity with such expert through prior litigation does not relieve a party from complying with the disclosure requirements of Rule 4:1(b)(4)(A)(i).

Crane also argues that the trial court should have allowed the testimony of both Dr. Roggli and Buccigross because the Estate admitted that the disclosures regarding Roggli and Buccigross were "exemplary, in comparison to Dr. Feingold's," another of Crane's intended expert witnesses.

The record shows that the Estate's statement regarding the quality of Crane's disclosures at issue was made as a comparison to the fact that Crane had not disclosed any of the expected testimony of Dr. Feingold. The statement cannot be fairly taken as a concession that Crane complied with the requirements of the disclosure rule for all purposes.

In summary, we conclude that the trial court did not abuse its discretion in refusing to allow the testimony at issue because Crane did not disclose

that Dr. Roggli would render an opinion on asbestos in the ambient air and did not identify the substance of Buccigross' opinion as required by Rule 4:1(b)(4)(A)(i).

IV. AMOUNT OF THE VERDICT

Crane asserts that the trial court erred in failing to set aside the verdict because it was excessive when compared to verdicts in similar cases and based on the facts of this case, it was the product of passion and prejudice.

Citing our prior decisions in Chesapeake & Ohio Railway Co. v. Arrington, 126 Va. 194, 101 S.E. 415 (1919), and P. Lorillard Co. v. Clay, 127 Va. 734, 104 S.E. 384 (1920), Crane urges us to compare the verdict in this case to the verdicts rendered in other cases involving similar facts. Crane acknowledges that this Court has "recently declined to engage in verdict comparison," but argues that the practice of comparing verdicts does not appear to be "foreclosed" in Virginia. In the two cases primarily relied upon by Crane the plaintiffs sought damages for the loss of a limb. In those cases, the Court looked to verdicts in other cases involving the same injury as one part of its determination whether the verdict in the case before it was excessive. Arrington, 126 Va. at 218, 101 S.E. at 423; P. Lorillard, 127 Va. at 756, 104 S.E. at 391.

Since these two cases, however, this Court has routinely rejected the use of an "average verdict rule" in determining whether a verdict is excessive. As early as 1925, in Farris v. Norfolk and Western

Railway Co., 141 Va. 622, 126 S.E. 673 (1925), we stated that the rule "cannot be invoked where the injuries are internal, and have produced a condition of greatly impaired earning capacity, continuous pain and suffering, and a dislocated kidney that may or may not produce serious results." Id. at 626, 126 S.E. at 674.

Subsequent cases did not use an "average verdict rule" where issues of pain and suffering were involved. Rather, this Court reviewed the facts and circumstances of each case to determine whether the verdict was excessive and the product of jury passion and prejudice or misapprehension of the case. See, e.g., National Fruit Product Co. v. Wagner, 185 Va. 38, 40-41, 37 S.E.2d 757, 758-59 (1946); Williams Paving Co. v. Kreidl, 200 Va. 196, 204, 104 S.E.2d 758, 764 (1958); Lilley v. Simmons, 200 Va. 791, 797, 108 S.E.2d 245, 249-50 (1959); Edmiston v. Kupsenel, 205 Va. 198, 203, 135 S.E.2d 777, 780-81 (1964); Gazette, Inc. v. Harris, 229 Va. 1, 48, 325 S.E.2d 713, 744-45 (1985) (relying on record to find that verdict bore "no relationship to the loss actually sustained by the plaintiff" and was excessive); Reel v. Ramirez, 243 Va. 463, 467, 416 S.E.2d 226, 228 (1992) ("we examine the record . . . to determine if the trial judge abused his discretion" in granting a remittitur on grounds that verdict was allegedly excessive); Norfolk Bev. Co. v. Cho, 259 Va. 348, 354-55, 525 S.E.2d 287, 290-91 (2000) (analyzing record to determine jury verdict was not excessive); Shepard v. Capitol Foundry of Virginia, Inc., 262 Va. 715, 720-21, 554 S.E.2d 72, 75 (2001) (analyzing excessiveness of verdict based on the record); Allstate Ins. Co. v. Wade, 265 Va. 383, 394-95, 579

S.E.2d 180, 186-87 (2003) (stating that verdict is excessive when it shocks the conscience of the court and creates impression that jury was improperly motivated or confused, and examining record to determine that verdict was not excessive as a matter of law).

The "average verdict rule" was more recently rejected in Rose v. Jaques, 268 Va. 137, 597 S.E.2d 64 (2004). In that case, the defendants argued the verdict was excessive in light of other verdicts in similar cases. Declining to engage in a 18 comparison, we applied an abuse of discretion standard, based upon the evidence in the record. Id. at 159-60, 597 S.E.2d 77. See also Government Micro Resources, Inc. v. Jackson, 271 Va. 29, 48-49, 624 S.E.2d 63, 74 (2006). In sum, the "average verdict rule" is not probative of whether a verdict is excessive; rather that determination must be made based on the facts and circumstances of each case.

In addition to urging us to consider verdicts in similar cases, Crane contends the jury verdict in this case was not related to the evidence presented. Crane points out that Garland Jones suffered a stroke in 2001, was diagnosed with mesothelioma in January 2005, and died six months later, in June 2005. According to Crane, these facts and the fact that jury's original award exceeded the damages requested, show that the jury was motivated by passion or prejudice.

We find nothing in the record to support Crane's contention that the verdict was not the product of an impartial decision. At trial, the Estate

produced evidence that medical expenses for Garland Jones totaled $394,857.01 and that his funeral expenses were $9,678.06. Also admitted was a statement written by Garland Jones in which he stated he was "devastated" to learn he had mesothelioma and described his illness as the "bottom" falling out from underneath him and a "roller coaster ride." Ashley Higgenbotham, one of Garland Jones' children, testified that after Jones was diagnosed with mesothelioma, he was "barely mobile" and "very depressed," which was uncharacteristic for him. Higgenbotham testified that her father's death in a nursing home was an "absolute nightmare." Michael Jones, another of Garland Jones' children, testified that Garland Jones was in the "best health of his life" and even volunteered for Meals on Wheels after his 2001 stroke. Michael Jones also described how Garland Jones' physical and psychological state deteriorated after his diagnosis and until his death.

The jury also heard evidence that Garland and Wanda Jones had been married for 41 years and were "very loyal to one another" and "loved each other very much." Wanda Jones testified about the pain and sorrow she felt upon her husband's death.

In addition, the jury heard evidence from Dr. G. Dastgir Qureshi, Garland Jones' physician, who testified about mesothelioma in general and about the progression of Garland Jones' disease. Dr. Qureshi testified about the chemotherapy performed on Garland Jones and fact that the chemotherapy eventually caused sepsis and acute renal failure. Dr. Qureshi also testified about several medical

procedures undergone by Garland Jones, and described Garland Jones' severely impaired physical state at the time of his death.

The jury was given the following instruction on damages, without objection from Crane:

> If you find for the plaintiff, your verdict shall be in such sum as will fully and fairly compensate such plaintiff for her damages. In determining damages to which she is entitled you shall include, but are not limited to, any of the following which you believe by the greater weight of the evidence: One, any pain and suffering of Garland Jones. Two, any damages for sorrow, mental anguish and solace, which may include loss of society, companionship, comfort, guidance, kindly offices and advice that is suffered by Wanda Jones as a result of the injury and death of Garland Jones. Three, compensation to Wanda Jones for the reasonably expected loss of the services, protection, care and assistance provided by Garland Jones. Four, expenses for care, treatment and hospitalization of Garland Jones that are incident to the injury resulting in his death. And five, reasonable funeral expenses of Garland Jones.

Based on this instruction and the evidence presented at trial, we cannot say the trial court

abused its discretion in determining that the verdict was not excessive and not so out of proportion to the injuries suffered as to suggest that it was not the product of a fair and impartial decision.

V. CONCLUSION

For the reasons stated above, we will affirm the judgment of the trial court.

Affirmed.

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

WANDA T. JONES, Administratrix of the Estate of GARLAND F. JONES, JR., Deceased,
Plaintiff,

v. **At Law No. 39028T-01**

JOHN CRANE, INC.,
Defendant.

AMENDED ORDER

THIS DAY came the plaintiff, Wanda T. Jones, Administratrix of the Estate of Garland F. Jones, Jr., deceased, by counsel, and the Defendant, John Crane, Inc., by counsel, on John Crane's Post trial Motions To Set Aside The Jury's Verdict;

WHEREAS, on July 26, 2006, the jury returned a verdict in favor of the plaintiff and awarded the plaintiff $10,000,000 in compensatory damages and $400,000 in medical and funeral expenses, for a total jury award of $10,400,000; and

WHEREAS the jury apportioned 34% of the total jury award to defendant John Crane, Inc., 33% of the total award to Garlock Sealing Technologies, LLC, and 33% of the total award to Johns-Manville, Inc.; and

WHEREAS the Court reduced the verdict to $10,000,000, this being the amount sought in the plaintiff's *ad damnum* clause; and

WHEREAS the Court duly entered a Final Order on July 26, 2006, for amount of $10,000,000 against John Crane, Inc. for 34% of the verdict, Garlock Sealing Technologies, LLC, for 33% of the verdict, and Johns-Manville, Inc. for 33% of the verdict; and

WHEREAS the defendant filed written motions to set aside the verdict on August 7, 2006; and

WHEREAS each of the parties have filed written briefs relating to John Crane's Post Trial Motions to Set Aside the Jury's Verdict, and both parties have fully argued said motions *ore tenus,* and the motions are ripe for decision;

THE COURT FINDS for the reasons stated in the record and the reasons set forth in the Plaintiff's Opposition to John Crane's Motion to Set Aside the Jury Verdict, as follows:

1. That the Jury's verdict, as reduced to conform with plaintiff's *ad damnum,* is not excessive under the circumstances of this case, does not shock the conscience, and was not motivated by an improper desire to punish John Crane;

2. That the jury instructions given in this case were complete and accurately stated the law applicable to this case;

3. That the plaintiff was entitled to call Terrence McNamara, John Crane's corporate officer, designated corporate representative, and custodian of records, as an adverse witness to testify to material issues impacting the credibility of John Crane, and that

the plaintiff's examination of this witness did not unfairly prejudice John Crane;

4. That the testimony of the defendant's expert, Victor Roggli, was properly limited to the "substance of the facts and opinions" and "the grounds for each opinion" set forth in his disclosure, report, and deposition testimony pursuant to Supreme Court Rule 4:1(b)(4)(A);

5. That the testimony of defendant's expert, John Buccigross, was properly limited to the "substance of the facts and opinions" and "the grounds for each opinion" set forth in his disclosure and in the reports identified on John Crane's exhibit list pursuant to Supreme Court Rule 4:1(b)(4)(A), and that Mr. Buccigross was properly limited from testifying regarding reports that were not disclosed to the plaintiff on John Crane's exhibit list or otherwise;

6. That the testimony of the defendant's expert, Paul Steward, was properly limited to the "substance of the facts and opinions" and "the grounds for each opinion" set forth in his disclosure pursuant to Supreme Court Rule 4:1(b)(4)(A), and that Mr. Steward was properly limited from showing a video tape of a completed World War II era destroyer when he was unable on *voir dire* to account for the many differences and variables between that vessel and the U.S.S. America, an aircraft carrier under construction in the 1960s on which the plaintiff worked;

7. That the verdict form approved by the Court was proper under general maritime law and the pre-trial rulings of this Court;

8. That a reasonable jury could determine that there was only sufficient evidence presented to allocate damages against John Crane, Inc., Garlock Sealing Technologies LLC, and Johns-Manville, Inc., and that the jury did not act arbitrarily or improperly in refraining from allocating damages to Westinghouse, Foster Wheeler, and Goulds;

9. That the plaintiff's counsel properly commented during closing argument on the absence of evidence relating to issues for which John Crane bore the burden of proof;

10. That, upon agreement of the parties, Johns-Manville's portion of the verdict will not be reallocated to John Crane in this case; and

11. ~~That John Crane's request that this Court affirm all of John Crane's pretrial, trial, and post trial objections and that this Court rule that John Crane has not waived any of its objections at any stage of this trial is not a proper motion that may be considered by this Court; it is therefore~~

ORDERED that the defendant's motion to set aside the verdict be, and hereby is, denied as to each of the grounds asserted by the defendant for the reasons stated on the record of this proceeding and for the reasons set forth the plaintiff's Opposition to John Crane's Post Trial Motions to Set Aside the Jury's Verdict; and it is further

ORDERED that judgment shall be, and it hereby is, entered against the defendant, John Crane Inc., in the amount of $3,400,000, with legal interest thereon

from July 26, 2006 until paid and the costs, such amount being the 34% share of the total jury award assigned by the jury to John Crane, Inc., with exceptions taken by the defendant to all such rulings.

The Court further Orders that the Clerk provide a certified copy of this Order to counsel for both plaintiff and defendant.

And the record made by the Court Reporter herein of the said proceedings is filed as part of the record in this case.

Entered this 14th day of August, 2006.

/s/
C. Peter Tench, Chief Judge

SEEN:

/s/
Counsel for Plaintiff
Robert R. Hatten, Esq.

SEEN AND OBJECTED TO for all reasons stated in the record and in the motions and briefs previousiy filed herein:

/s/
Counsel for Defendant John Crane Inc.
Archibald Wallace, III, Esq.

VIRGINIA: In the Circuit Court for the City of Newport News Wednesday, the 26th day of July, 2006

PRESENT: C. Peter Tench, Judge.

Wanda T. Jones, Administratrix
of the Estate of Garland F. Jones, Jr., deceased
Plaintiff,

vs. Law No. 39028-PT

John Crane, Inc.
Defendant.

ORDER

This day came the plaintiff, by counsel, and also came the defendants, by counsel. Jill B. Fortner, court reporter was sworn to faithfully and accurately take down and transcribe the proceedings herein and the Jury heretofore impaneled, retired to their room to consider their verdict.

And after some time, the Jury returned into the Court with the following verdict, to-wit:

"We, the jury, find in favor of the plaintiff, Wanda Jones. We, the jury, award the plaintiff, Wanda Jones, damages for the following: compensatory damages in the amount of $10,000,000.00, medical expenses in the amount of $400,000.00, and funeral expenses in the amount of $0.00. We do not award [interest, (signed by the foreperson)."

"We, the jury find that one or more of the companies listed below are at llfault and that they substantially contributed to Garland Jones' injury and death, we allocate the percentages of liability as follows:

John Crane	34%
John-Manville	33%
Garlock	33%

On motion of the defendant, by counsel, the Jury was polled.

Upon consideration, the Court finds the jury verdict amount exceeds the amount sought for in the plaintiffs Motion for Judgment; therefore, the Court enters a verdict in the amount of $10,000,000.00.

It is therefore **ADJUDGED AND ORDERED** that the plaintiff recover and have judgment against the defendants in the amount of $10,000,000.00, with legal interest thereon from July 26, 2006 until paid and the costs.

And this matter is continued until August 7, 2006 at 2:00 p.m. before Judge C. Peter Tench to address motions presented by counsel.

And the record made by the Court Reporter herein of the said proceedings is filed as part of the record in this case.

/s/ C. Peter Tench, Judge

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

WANDA T. JONES, ADMINISTRATRIX OF THE ESTATE OF GARLAND F. JONES, JR.,

Plaintiff,

AT LAWN NO. 39028T-01

v.

GARLOCK SEALING TECHNOLOGIES, LLC, et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

Newport News, Virginia

February 10, 2006

Before: THE HONORABLE CHARLES P. TENCH, CHIEF JUDGE

Appearances:

PATTEN, WORNOM, HATTEN & DIAMONSTEIN, LLC

By: ROBERT R. HATTEN, ESQUIRE
HUGH B. McCORMICK, III, ESQUIRE
WILL W. C. HARTY, ESQUIRE
Counsel for the Plaintiff

WALLACE PLEDGER, PLCC

By: ARCHIBALD WALLACE, III, ESQUIRE
THOMAS J. MORAN, ESQUIRE
Counsel for the Defendant John Crane, Inc.

LeCLAIR RYAN

By: ERIK D. NADOLINK, ESQUIRE
Counsel for the Defendants Dana Corporation and General Electric

(Whereupon, the reporter was first duly sworn and the proceedings commenced at 10:00 a.m.)

THE COURT: Okay, gentlemen.

MR. HATTEN: Good morning, Your Honor.

THE COURT: Great morning.

MR. HATTEN: Cold morning. Snow is on its way.

THE COURT: God's in his heaven. All is right with the world.

MR. HATTEN: Your Honor, we're here for the final pretrial –

THE COURT: Yes, sir.

MR. HATTEN: -- of the Garland Jones case and we have filed a number of motions. There is a heavy agenda.

I'd like to first take up four motions that are related to admiralty jurisdiction because that's what we contend is the controlling law in the case. And there are – the four motions that relate to this issue are Mr. Wallace's motion in which he contends that the Virginia Supreme Court misread Sisson, Grubart, and East River, and that they were wrong in their application of admiralty jurisdiction to these shipyard product liability cases. Related to that motion is the issue of the "should have known" standard which is the plaintiff's burden of proof and

there was no response to that. I'm assuming it's because if we are correct on admiralty law they --
MR. WALLACE: I responded.

MR. HATTEN: Okay.

THE COURT: Well, let me say this: If you're correct on admiralty law, my understanding is it is the "should have known" rather than "reason to know" –

MR. HATTEN: Yes, sir.

THE COURT: -- although I'll give Mr. Wallace and Mr. Nadolink the chance to argue and put any exceptions they so desire in the record.

MR. HATTEN: Yes, sir. I'd like to just finish the list of things I think are related to the admiralty. One is the "should have known" standard, the other is joint and several liability, and the third is bankrupt defendants, whether or not they can be on the jury form and how do you handle settlements with bankrupt defendants in terms of the jury form.

So, Your Honor, with regard to admiralty jurisdiction, the first issue, we have again briefed this issue to you and very, very briefly, we contend that the test of Sisson and Grubart has been fully satisfied both at the general level of admiralty jurisdiction, the specific level of admiralty jurisdiction. We've attached to our brief advertisements by this company for its products to be used in shipyards and on ships and we have explained the application, the East River case and all these various matters that we've had long

hearings with Your Honor about, and we will rest on – with regard to the continuing application of the maritime jurisdiction and admiralty law on the previous arguments that we've made to you and the Supreme Court's case in Little. And I think given the brevity of that Court's opinion, this was not a hard issue for the Supreme Court of Virginia. They decided it extremely expeditiously and I think that there's no reason to go back into all that, but I'm going to rest on our brief, and to the extent that Mr. Wallace thinks that the Supreme Court was wrong on the Little case I'm going to let him argue that at this time.

THE COURT: Thank you.

MR. WALLACE: Good morning, Your Honor.

THE COURT: Good morning.

MR. WALLACE: We have filed a brief requesting that Virginia law be applied an not admiralty in this case, taking exception with prior issues in this court and with Little. We believe admiralty is inappropriate in this case because a careful reading of the Little case shows that rather than consider the tortious conduct of the defendant as establishing the specific level or part two of the nexus test, the Virginia Supreme Court accepted a place where in both parts of it, under admiralty, you must have lexis and nexus. We don't contest lexis for this motion, but under nexus the relationship to maritime activity has been determined by the three cases mentioned by Mr. Hatten to be what was – where and what was the tortious conduct of the

defendant. The tortious conduct we're charged with in this case at least in the allegations are you made a defective product and you failed – you failed to warn adequately.

I understand from the briefs that have been filed that the defective product, the manufacture or design of it, is not an issue in this case. But the case turns, as I understand it, on the failure to warn, the defectiveness in the warning. And our argument is that that wrong occurred at the time the product was placed into the stream of interstate commerce. It occurred at the point of manufacture and distribution, not using – as Little has said, not using ship repair as the determining factor, because if you go to ship repair, it's on both sides, it's on the lexis and nexus side, and if you read these cases – Supreme Court cases carefully, they talk about the tortuous conduct or the wrong of – or the act of the wrongdoer. Our act, according to the plaintiff was failure to warn that occurred at the time the product left us and was placed into the stream of commerce. We've briefed this. We believe that a careful reading of Little and the issue that we raised is not in Little, it was not addressed, and the Supreme Court had it had this before it perhaps would have then applied it as we are asking here. The Supreme Court's decision is Little, in my opinion, is silent.

Now, plaintiff's have in their reply brief attached some documentation that I'm not aware that is otherwise in the exhibits to this case, but – they may be, but I'm not aware of that. But in reading those exhibits they speak to what I consider to be one of the exceptions to the admiralty question

of the tortious conduct of the defendant. One of the exceptions is to that, if you made a product that was designed and intended for maritime use. I think it would be difficult to come back later and say the use of that product in a maritime – or in shipbuilding would not – would take – would not give you the right to that defense. I thank that – to me, that's an exception to that tortious conduct, if you can show a particular product was made with an eye toward maritime use.

What the plaintiffs have attached as exhibits to their reply brief, if the Court would look – if the Court has looked or would look –

THE COURT: I have.

MR. WALLACE: If the Court looks at those, those that apply to asbestos and some style numbers, none of those are involved in this case. And the evidence in this case doesn't include any of the numbers that are listed there that are asbestos, but of those that are asbestos none of them have been identified as products in this case.

Also, if you look at the attachments, the SuperSeal number one, it talks about – it's for – available in the plant, throughout the plant, for handling acids, alkalies and solvents.

If you look at the next one, mechanical pump seals, it says if you want a brochure about that you may order it, but it doesn't say what's in the brochure.

When it goes to the next one it talks about John Crane type nine cargo pump seals, type nine seals bulk products, but we're not dealing with that in this case.

And then the last one reflects at July of '66 the hiring of a Mr. Guthrie to be marine liaison officer for Crane packing. That in and of itself, again, doesn't necessarily mean that our products were intended for maritime use. And I think you have to go to the specific products identified to date in this case, either through testimony, pictures or exhibits, and when you look at those, none of those products are among those listed here by plaintiff's counsel. So, to me, the exception does not apply. The products that we're dealing with in this case were not products made for maritime application per se. So you go back to the place where the products were placed into the stream of commerce, which is the place of manufacture, and that's when the wrong occurred. And we've submitted a brief on this. I would rely on the brief and the argument here today. Thank you.

THE COURT: Okay. Well, you know, if you follow that line of thinking, then the Sisson case where you had a dryer that causes a fire in the marina, then the tort ought to be where the product is manufactured that that certainly is – a dryer can be used for anything.

MR. WALLACE: The dryer was a component, I thought. Maybe I misread Sisson, but –

THE COURT: No.

MR. WALLACE: -- I did not think it was a component to be used anywhere. I thought it fit in with the marina of the ship.

THE COURT: Well, used on a ship, but you could then use the same theory, couldn't you, for anything, that any product that goes on a ship that can be used for anything else that you can never apply admiralty if it's not just used for a ship?

MR. WALLACE: Or intended for use on a ship.

THE COURT: Used it for a ship, yes.

MR. WALLACE: I agree with that. I think that's the argument that can be made, but Sisson didn't deal with that.

THE COURT: Well, I'm goint to – of course, Mr. Nadolink, you want to make an argument, too?

MR. NADOLINK: Good morning, Your Honor. I just want to state for the record that on behalf of Dana Corporation we join John Crane's opposition and continue to believe that maritime time law shouldn't apply pursuant to the Oman decision by the Fourth Circuit, but I don't intend to reargue the issue.

THE COURT: Oh absolutely. Well, I think I said many moons ago that I thought Oman was history. And I think Mr. Wallace even commented that if they followed my thinking it would set the asbestos industry – the world of litigation on its ear or something. Something to that effect which was – but

you said it a lot better than I can, though. So, please, I probably misquoted you, but your – you know, your quote was much more incisive and better said than –

MR. WALLACE: And I will accept the Court's remembrance on that. I'm sure that –

THE COURT: Well –

MR. WALLACE: -- something was added.

THE COURT: Well, I think it really did. It was very, very insightful, because after the Little case was decided I had the opportunity to be at a law school alumni meeting and I ran into one of the professors and he said he had talked to my son, who's in law school, and he said, I need to meet your father. And I couldn't figure out why because all I remembered was taking constitutional law from this guy, which I hated. So he came over and started shaking my hand and he said, You know, you've brought – your ruling has really brought a lot of focus back to admiralty. And we're having a lot of people come to our conventions now. And so anyway, he went on and on and on about, you know, admiralty and asbestos.

But anyway, I'm going to apply maritime law and we'll note your exceptions and reserve any argument or whatever you want to reserve in any way possible for use at another level.

MR. HATTEN: For the record, SuperSeal is in this case and counsel, I'm sure inadvertently,

misrepresented that ad because the ad does not deal with just SuperSeal on acids.

THE COURT: Okay. Counsel, if you are more comfortable being seated, you don't have to stand up every time you want to say something. That doesn't bother me, if you'd rather stay seated. I know we've got a lot of stuff in front of us. So don't feel the need to have to keep getting up if you would prefer to be seated when you're trying to cover something.

MR. NADOLINK: Thank you, sir.

THE COURT: So I am going to follow the rule set forth in Little - the Garlock Sealing Technologies, L.L.C. v. Little, the Supreme Court, that admiralty law – maritime and admiralty law would apply.

So let me take this folder and put it here. I'm trying to separate these as we go.

Now, my understanding, that will preempt the arguments as far as "should have known"?

MR. HATTEN: Yes, sir. I think we have briefed that and that was agreed to by Judge Conway when he tried this case and it was undisturbed by the Supreme Court even though it was specifically objected to by Garlock. It was briefed by a number of people and the Supreme Court did not disturb that ruling at all.

THE COURT: Okay. Well, let me – since we have such voluminous motions, what I'm trying to do is go through it and separate the ones that we have

resolved – or have addressed. Let's put it that way. May not have resolved it, but perhaps have addressed it.

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

WANDA T. JONES, Administratrix of the Estate of GARLAND F. JONES, JR., Deceased,

Plaintiff,

v. **At Law No. 39028T-01**

DANA CORPORATION, *et al.*,

Defendants.

TRIAL BEGINS: March 1, 2006

PLAINTIFF'S OPPOSITION TO JOHN CRANE, INC.'S MOTION TO APPLY VIRGINIA LAW

Contending that this Court, Judge Conway, and the seven unanimous Justices on the Virginia Supreme Court are wrong, John Crane argues that this Court should apply Virginia law rather than maritime law to this case. This case is indistinguishable from *Little v. Garlock* for purposes of the jurisdiction analysis. Accordingly, this Court should find that admiralty jurisdiction controls and apply maritime law, not Virginia state law.

This issue was fully briefed in this Court in 2004 and in the Virginia Supreme Court in 2005. After considering all the briefs, this Court ruled in August 2004 that under the prevailing legal authority "admiralty and general maritime

jurisdiction have been properly pleaded by Plaintiffs in the Master Motion for Judgment and will apply to all of Plaintiffs' claims" against the defendants "in these actions subject to proof at trial that the Plaintiffs' claims arise in part as a consequence of asbestos exposure during ship repair." *See Order In re All Asbestos Cases* (Aug. 6,2004) (attached hereto as Exhibit A).

Judge Conway adopted this Court's order as his own in the companion cases, *Little v. Garlock* and *McLean v. Owens-Illinois, Inc.*, At Law No. 31799V-04 (attached hereto as Exhibit B). He extended the order, however, stating that "admiralty jurisdiction and general maritime law apply where the Plaintiffs alleged asbestos exposure to products manufactured, sold or used by these Defendants occurs solely from ship construction activities on launched, but uncompleted vessels (still under construction) on the navigable waters of the James River." *Id.* Judge Pugh and Judge Hubbard of the Newport News Circuit Court also adopted these orders. The unanimous Virginia Supreme Court subsequently affirmed these orders in *Garlock Sealing Technologies, LLC v. Little*, 270 Va. 381,620 S.E.2d 773 (2005).

Rather than rehashing all of the arguments made in earlier briefs on this subject, the Plaintiff will address two new points raised by John Crane's brief, and then rely on the rulings already made by this Court, Judge Conway, and the Virginia Supreme Court and incorporate by reference the arguments presented in the memorandum filed before the Virginia Supreme Court.

A. This Case Satisfies the First *Sisson* Test Because The Incident Involved Is of a Sort that Has the Potential to Disrupt Maritime Commerce.

John Crane raises two primary points under the first *Sisson* test First, John Crane argues that the "incident" under this prong should "relate to some wrong embedded in the actions or failures of the defendant." *John Crane's Brief*, at 7. Second, John Crane states that even if "incident" is defined as this Court, the Virginia Supreme Court, and the Plaintiff define it — ship repair on a vessel in navigable waters — it still does not qualify for Admiralty jurisdiction because the "docks, construction piers and drydock are away from and not a part of the usual navigable portions of the waterway." *Id.*

John Crane is wrong on both points. First, the Supreme Court did not define "incident" in relation to some negligent action or omission of the Defendant. *See generally Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995); *Sisson v. Ruby*, 497 U.S. 358 (1990). The "intermediate level of generality" is broader than that. For instance, the alleged negligent action in *Executive Jet* was the failure of the City of Cleveland to keep the airport free of birds. But the "incident," as later defined by the Court, was an "aircraft sinking in the water...." *Sisson*, 497 U.S. at 363. Likewise, though the tortious act in *Sisson* involved a design defect in a washer/dryer unit, the "incident" was a fire on a vessel docked at a marina

on navigable waters." *Id.* Indeed, the Court in *Sisson* was careful to point out that this aspect of the jurisdictional inquiry does not "turn on the particular facts of the incident in this case, such as the source of the fire;" yet inquiring into the source of the fire is precisely what John Crane would have this Court do. *Id.*

John Crane's second point is wrong as well — i.e., that the ship repair was too far removed from "the usual navigable portions of the waterway." *John Crane's Brief*, at 7. It must be borne in mind that in discussing the potential impact of the pleasure boat collision in *Foremost,* the Court did not look at the actual impact on commerce on the relatively small Amite River in Louisiana, where the accident actually occurred. *See Foremost Ins. Co. v. Richardson*, 457U.S. 668, 669 (1982). Rather the Court projected the general type of incident — a collision between two boats — into a busier waterway — the mouth of the St. Lawrence Seaway — in determining whether incidents of the *type* could potentially have an impact on maritime commerce. *See id.* at 675. Similarly, in *Sisson*, the Court expressly stated that this aspect of its inquiry did not turn on "the specific location of the yacht at the marina, that may have rendered the fire on the *Ultorian* more or less likely to disrupt commercial activity." *Sisson*, 497 U.S. at 363. In each of these cases, the Court was not concerned that the actual incident did not have a direct impact on maritime commerce; instead, the Court was concerned that the same type of incident could potentially impact maritime commerce in a different setting.

In sum, both of the two primary points John Crane makes relating to the first *Sisson* test are directly and expressly refuted by the Court's opinions.

B. This Case Satisfies The Second Sisson Test Because The General Character Of The Activity Giving Rise To The Incident Shows A Substantial Relationship To Traditional Maritime Activity.

John Crane contends that the Virginia Supreme Court "clearly misses" the second *Sisson* test. This is because, according to John Crane, the Supreme Court "failed to select the appropriate activity for its test" and should have chosen the specific tortious conduct of the defendant. John Crane then narrows the definition of tortious conduct to its initial negligent act at its factory, which it contends has no relation to a traditional maritime activity. John Crane "clearly misses" the analysis in every aspect of its argument.

1. United States Supreme Court Does Not Base Its Analysis On A Single Tortfeasor's Particular Tortious Act, But on the General "Activity Giving Rise to The Incident".

In discussing the second *Sisson* test, the *Grubart* Court characterized the test as looking "to whether the *general character of the activity giving rise to the incident* shows a substantial relationship

to traditional maritime activity." *Grubart*, 513 U.S. at 539 (emphasis added). Though the Court in *Grubart* periodically used the term "tortfeasor," when it was expounding on the test the Court cited to its previous cases as examples of what had been considered to be the "general character of the activities" in those cases.

The "activity giving rise to the incident" in *Grubart,* itself, was "repair and maintenance work on a navigable waterway performed from a vessel." *Grubart,* 513

U.S. at 540. Though this relates to the tortfeasor's work, it does not relate to the tortfeasor's particular negligent act. There is a difference. Indeed the Court in *Grubart* "made it clear that we need to look only to whether one of the arguably proximate causes of the incident originated from *the maritime activity* of a tortfeasor," not the maritime negligent act. *Id.* at 541. In other words, "as long as one of the putative tortfeasors *was engaged in traditional maritime activity* the alleged wrongful activity will 'involve' such traditional maritime activity and will meet the second nexus prong." *Id.*

Moreover, the Court gave examples of "activities" that it used in previous cases when analyzing the second *Sisson* test. All four examples given by the *Grubart* Court, related to the general activities surrounding the incident — not the tortfeasor's particular negligent act. For instance, the general activity in selected by the Court for *Executive Jet* - "flying an airplane over the water" – had nothing to do with the tortfeasor's negligent act

of failing to keep a runway clear of birds. *Id.* (citing *Executive Jet*, 409 U.S. 249, 270-71 (1972)). Similarly, the general activity of "swimming," in the swimming cases discussed in *Executive Jet* did not rest or even mention the tortfeasors' particular negligent actions. *Id.* (citing *Executive Jet,* 409 U.S. at 255-56 (citing *Davis v. City of Jacksonville Beach,* 251 F. Supp. 327, 328 (M.D. Fla. 1965) (surfboarder crashing into a swimmer); *McGuire v. City of New York,* 192 F. Supp. 866, 866 (S.D. NY 1961) (swimmer injured by City's negligent failure to keep swimming area at public beach free from debris))).

The general activity in *Sisson,* storing boats "at a marina on navigable waters," was not the particular tortious activity of any putative tortfeasor. *Id.* (citing *Sisson* 497 U.S. at 367). The tortious activity in *Sisson* was not expressly defined, but it would have been the designing of a defective washer/dryer unit, or the failure to have appropriate fire warning or prevention devices on the boat on which the fire started. *See Sisson,* 497 U.S. at 360.

Finally, the general activity in *Foremost* - "navigation of boats in navigable waters" - relates to the general activity of both the tortfeasor and the victim, but not to the particular negligent act (i.e., failure to keep a proper lookout, etc.) that caused the accident. *Grubart,* 513 U.S. at 540 (citing *Foremost,* 457 U.S. at 675).

Accordingly, though the *Grubart* Court alludes to the tortfeasor's activities, this reference must be understood to mean general activities of the parties

or "putative" parties involved, not the particular negligent act of a single tortfeasor.[1]

2. Assuming *Arguendo* that *Grubart* Intended to Refine the Test, John Crane's Activities Still Satisfy the Second *Sisson* Test.

Even if the *Grubart* Court intended to refine the second *Sisson* test to relate solely to a particular tortfeasor's tortious actions, this case would still qualify for admiralty jurisdiction. Admiralty has long analyzed tortfeasors' actions in the context of the traditional locality prong to determine whether the tort occurred on navigable waters. Prior to *Executive Jet,* if the tort occurred on navigable waters, it fell under admiralty, but if it occurred on land it did not. But the question of defining what constituted the "tort" or the "wrong" raised some problems. Did "tort" or "wrong" relate to the tortfeasor's particular negligent act — i.e., the negligent "manufacture and placement of defective products into the stream of commerce" "hundreds of miles inland," *John Crane's Brief at* 10 — or did

[1] Moreover as the *Grubart* Court made clear, "as long as one of the putative tortfeasors was engaged in traditional maritime activity," the second *Sisson* test is satisfied. *Grubart*, 513 U.S. at 541. As many of the defendants in these cases are fond of pointing out, Newport News Shipyard and the U.S. Navy are both putative concurrent tortfeasor in these cases. Both were engaged in traditional maritime activity.

these terms relate to the point at which the negligent act was "consummated" or brought to bear on the victim — i.e., on the navigable waters of the James River where the unwarned decedent inhaled the asbestos?

Since the Supreme Court's decision in *The Plymouth,* the answer has been that jurisdiction rests "not on the location of the wrongdoing" but on the place where the injury is "consummated." *The Plymouth,* 70 U.S. (3 Wall.) 20,34-35 (1866). This is because, in the words of the Court in *The Plymouth,* "The negligence, of itself, furnishes no cause of action; it is *damnum absque injuria*" — a matter for which there is no legal recourse. *See* B. Garner, *A Dictionary of Modern Legal Usage* 244 (2nd ed. 1995); *see also Executive Jet,* 409 U.S. at 266 ("Under the locality test, the tort 'occurs' where the alleged negligence took effect."). It is not until the negligence is brought to bear on a victim — is consummated — that a cause of action exists. And it is the point of this consummation, the Supreme Court has long held, that controls for purposes of determining whether the arises under admiralty jurisdiction.

Executive Jet did not abrogate this principle; it affirmed it:

> "The wrong and injury complained of must have been committed wholly upon the high seas or navigable waters, *or, at least, the substance and consummation of the same must have taken place upon*

> *these waters to be within admiralty jurisdiction....*"

Executive Jet, 409 U.S. at 253 (quoting *The Plymouth,* 3, Wall. 20,35 (1866); *see also id.* at 266 ("Under the locality test, the tort 'occurs' where the alleged negligence *took effect.*" (emphasis added)).

The *Grubart* Court noted that in creating the additional *nexus* inquiry (which the *Sisson* tests explicate) the "Court has not proposed any radical alteration of the traditional criteria for invoking admiralty jurisdiction in tort cases ...." *Grubart,* 513 U.S. at 542-43. In this vein, even if the *Grubart* Court intended to refine the second *Sisson* test to focus solely on the wrongful or tortious activity of the tortfeasor, it makes no sense to define "tort" or "wrong" one way for purposes of the locality prong and a completely different way for purposes of the *nexus* prong. To do so would be a "radical alteration" of the admiralty definition of "tort" or "wrong" for purposes of the jurisdictional inquiry.

Accordingly, even if the tortfeasor's particular tortious activity was the correct activity to analyze in the wake of *Grubart,* it must relate to the tortfeasor's *consummated* tortious activity, not solely the initial negligent act. For purposes of this case, the point of consummation occurred when the decedent — engaged in ship repair and construction and unwarned and unaware of the hazards of the Defendants' maritime products - inhaled asbestos fibers released from the Defendants' products. No cause of action existed until this point. The tortious activity, thus properly defined, was the Defendants'

supplying of hazardous maritime products for ship repair and/or construction without warning the occupational users of the hazards inherent in the products' normal and intended use.

As a final point, John Crane contends that its products were not made and intended for use specifically in a maritime setting. Therefore, John Crane argues, its tortious activities could not have been connected traditional maritime activities. First, this is specifically the type of argument the Court eschewed in *Sisson* when it stated that "[t]he jurisdictional inquiry does not turn on the particular facts of the incident in this case, such as the source of the fire or the specific location of the yacht at the marina." *Sisson*, 497 U.S. at 363. Indeed, nowhere in *Sisson* did the Court engage in the type of fact-specific analysis that John Crane now proposes to determine whether the defective washer/dryer that caused the fire was solely intended for maritime use.

Second, John Crane's claim that its products were not maritime products is not accurate. John Crane admits in its answers to interrogatories that it "has designed, manufactured and sold hundreds of products for particular uses and applications in a wide variety of industries, including ...shipbuilding." *John Crane's Answers to Interrogatory 6* (attached hereto as C). John Crane purposefully sought and gained approval of its products on the Navy's qualified products list and under various Navy specifications. *See Letter from Crane Packing Company to Department of the Navy, dated Jan. 24, 1963* (attached hereto as Exhibit D); *see also List of "John Crane " Packings conforming to*

Bureau of Ships Drawing 5153 (attached hereto as Exhibit E). John Crane advertised its products in mainline maritime journals, including the Marine Engineering Log. *See John Crane Advertisements from Marine Engineering Log* (attached hereto as Exhibit F). And John Crane maintained a "marine liaison engineer" who worked "with naval architects, port engineers, ship engineers and manufacturers of marine equipment using mechanical packing and seals." *See Announcement from Marine Engineering Log* (attached hereto as Exhibit G).

Accordingly assuming, *arguendo*, that the inquiry under the second *Sisson* test focuses on a particular tortfeasor's tortious activities, this case still arises under Admiralty.

C. John Crane's Approach Would Eviscerate the United States Supreme Court's Holding in *East River Steamship Corp v. TransAmerica*, 476 U.S. 858 (1986).

In *East River Steamship Corp. v. TransAmerica*, the Supreme Court held that Admiralty jurisdiction and maritime law recognize product liability claims. *See East River Steamship Corp. v. TransAmerica*, 476 U.S. 858, 865 (1986) ("We join the Courts of Appeals in recognizing products liability, including strict liability, as a part of the general maritime law."). John Crane claims that this case should not lie in Admiralty because the Plaintiff has not shown that "any product manufactured by John Crane purportedly involved in this case was ever manufactured or intended for

use solely in a maritime setting." *John Crane's Brief,* at 10-11. John Crane's argument, however, would essentially eviscerate the holding in *East River Steamship* because the vast majority of products that are used in maritime applications may also be used in non-maritime applications. For instance, there is no evidence that the defective washer/dryer Unit that caused the fire in *Sisson* was "manufactured or intended for use solely in a maritime setting;" yet that case arose under Admiralty. *See Sisson,* 497 U.S. at 360, 363. Accordingly, because John Crane's argument runs afoul of the Court's holding in *East River Steamship Corp.,* it must fail.

CONCLUSION

For the foregoing reasons, this Court should deny John Crane's motion and apply Maritime law during the trial of this case.

Respectfully submitted,

By: /s/
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was mailed to the following counsel of record this 6th day of February, 2006:

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/s/
Of Counsel

[PLAINTIFF'S EXHIBIT A]

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

In Re: ALL ASBESTOS CASES

At Law No. CL90-10000W-01
At Law No. CL90-10000C-03

WALLACE Y. ANDREWS, Jr.,
Plaintiff,

v. At Law No. CL02-31743-W-01
Transferred to Judge Tench T-01

DANA CORPORATION, et al.,
Defendants.

Dianna Arrington and Bradford Arrington,
Co-Executors, and Jennifer W. Vincent,
Ancillary Administrator of the Estate of
CHARLES E. ARRINGTON, Deceased,
Plaintiff

v. At Law No. CL02-36195W-01
Transferred to Judge Tench T-01

DANA CORPORATION, et al.,
Defendants.

ORDER

The Defendant, SB Decking, Inc., (hereinafter "SB Decking") filed a Plea in Bar to the Plaintiffs' Motion for Judgment in the above-styled matters and in all other asbestos product liability claims for personal injury or wrongful death filed by the law firm of Patten, Wornom, Hatten & Diamonstein, L.C., pending against SB Decking and other Defendants in the Circuit Court for the City of Newport News. SB Decking argues that the exclusivity provisions of the Virginia Worker's Compensation Act, Va. Code Ann. § 65.1 -1, *et seq.*, operate to bar the claims of the Plaintiffs because SB Decking was a subcontractor to Plaintiffs' employer, the Newport News Shipbuilding & Dry Dock Co. The Plaintiffs have opposed this motion on the grounds that Virginia law does not apply to these actions, that admiralty jurisdiction and general maritime law applies, and pursuant to general maritime law and the Longshore and Harbor Workers' Compensation Act, SB Decking is a proper Defendant in these cases. This matter was fully briefed by both SB Decking and counsel for the Plaintiffs, and all Defendants in the asbestos litigation pending in the Newport News Circuit Court were then given an opportunity to file briefs on this issue with the Court. On the 9th day of July, 2004, the matter was argued *ore tenus* by counsel for SB Decking, counsel for the Plaintiffs, and numerous other Defendants.

Upon consideration of the briefs of all parties, the pleadings, and the argument of counsel, the Court hereby denies SB Decking's Plea in Bar for the

reasons set forth in the transcript of the hearing in this matter dated July 23, 2004, in which the Court set forth the controlling cases and their applicability to these proceedings. Specifically, the Court finds that admiralty jurisdiction and general maritime law applies to the Plaintiffs' claims against SB Decking, Dana Corporation, and Metropolitan Life Insurance Company in the Arrington and Andrews cases, both of which were set for trial on August 23, 2004.

The Court also finds that admiralty jurisdiction and general maritime law does not apply to the claims against Georgia-Pacific, a Defendant in the Arrington case because the asbestos exposures occurred in Williamsburg, Virginia, during work that was unrelated to ship construction or repair. Upon motion of Georgia-Pacific, the Court hereby SEVERS Plaintiffs' action against the Defendant Georgia-Pacific from Plaintiffs' action against the remaining Defendants. Plaintiffs in the Arrington case have elected to proceed to try the case against Georgia-Pacific in this Court beginning August 23, 2004.

In consideration of the Court's ruling concerning admiralty jurisdiction and general maritime law, the Defendants Dana Corporation, SB Decking, and Metropolitan Life Insurance Company moved to continue the Andrews action, and the remainder of the Arrington action. The aforesaid Motion to Continue is granted, and it is hereby ORDERED that the trial of those cases is continued to a future date that will be determined by the Court.

The Court also finds that admiralty jurisdiction and general maritime law have been properly pleaded by Plaintiffs in the Master Motion for Judgment and will apply to all of Plaintiffs' claims against SB Decking and the other Defendants in these actions subject to proof at trial that the Plaintiffs' claims arise in part as a consequence of asbestos exposure during ship repair. The Court reserves the discretionary right to sever any claims against Defendants where the asbestos exposure did not occur during ship repair or construction at the Newport News Shipyard. The Court also reserves ruling on whether or not admiralty jurisdiction or general maritime law would apply in those cases where the Plaintiffs claims do not include asbestos exposure during ship repair and all of the alleged exposure to all of the asbestos Defendants' products occurred during ship construction.

The Clerk is directed to serve a copy of this Order upon all counsel of record in all asbestos cases filed by the law firm of Patten, Wornom, Hatten & Diamonstein, L.C. The objections of all parties as previously stated in their pleadings, their briefs, and in oral argument on this matter on July 9, 2004, and July 23, 2004, are hereby preserved.

ENTERED this 6th day of August, 2004

/s/ C. Peter Tench
Judge

I ASK FOR THIS:

/s/

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HAVE SEEN AND OBJECTED TO:
By all Defendants for reasons previously set forth in the record, in briefs filed by Defendants in this Court, and at the hearings on this matter on July 9, 2004, and July 23, 2004

[PLAINTIFF'S EXHIBIT B]

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

Charmaine G. McLean, Executrix and
Personal Representative of the Estate of
MAYNARD F. McLEAN, Deceased,
Plaintiff,

vs. AT LAW NO. 31799V-04

OWENS-ILLINOIS, INC., et al.,
Defendants.

MEMORANDUM ORDER

THIS DAY appeared counsel for Owens-Illinois and counsel for the Plaintiff, in person, pursuant to certain pretrial motions that had been filed by Owens-Illinois in this matter, including (a) motion by Owens-Illinois to restrict admiralty jurisdiction and general maritime law as alleged by the Plaintiff to cases involving ship repair, and to sever Plaintiffs causes of action against Owens-Illinois on the grounds that exposure to Owens-Illinois' asbestos products occurred solely on launched, but uncompleted vessels at the Newport News Shipyard; and (b) motion by Owens-Illinois to strike Plaintiff's allegations concerning strict liability in tort as contained in the 20th Amendment to the Master Motion for Judgment filed in these asbestos actions on June 23, 2004, on the grounds that this amendment did not relate back to the date on which the Plaintiff's original Abbreviated Motion

for Judgment was filed in this Court and on the grounds that the allegations concerning strict liability in tort constituted a new cause of action that was barred by the Virginia two-year statute of limitations. Other parties to this action, i.e., SB Decking and Dana Corporation, participated in this hearing by telephone conference call. A Brief in Support of Owens-Illinois' motion to limit admiralty jurisdiction was filed by SB Decking and considered by the Court, as well as a Brief in Opposition that was filed by Plaintiff's counsel. The Court has also considered Briefs filed by Owens-Illinois in support of its motion concerning strict liability, as well as a Brief in Opposition filed by Plaintiff's counsel.

UPON CONSIDERATION of the briefs, the arguments of counsel, and the controlling authorities as previously set forth in the transcript of Judge Tench's ruling on July 23, 2004, In Re: All Asbestos Cases Pending in the Circuit Court for the City of Newport News (which explains the rationale for the application of admiralty jurisdiction, as applied to asbestos exposures involving ship repair at the Newport News Shipyard on vessels in the navigable waters of the James River), this Court hereby ORDERS that admiralty jurisdiction and general maritime law apply where the Plaintiff's alleged asbestos exposure to products manufactured, sold or used by these Defendants occurs solely from ship construction activities on launched, but uncompleted vessels (still under construction) on the navigable waters of the James River. Since it has been stipulated by the parties that the alleged exposure to asbestos products manufactured by

Owens-Illinois occurred, if at all, on the Santa Rosa and the Santa Paula after both of these ships had been launched onto the navigable waters of the James River, but prior to the completion of these vessels, the Motion to Sever by Owens-Illinois is denied, and general maritime law shall apply to this case.

IT IS FURTHER ORDERED that the Plaintiffs allegations of strict liability in tort as contained in the 20th Amendment to the Master Motion for Judgment is not a new cause of action, but rather an amplification of the Plaintiff's previous and longstanding allegations concerning the application of general maritime law to these cases; therefore, these allegations shall relate back to the date on which the Plaintiff's original Abbreviated Motion for Judgment was filed. The Court finds that the controlling statute of limitations in these cases is three years pursuant to general maritime law; consequently, even if the allegations concerning strict liability in tort constituted a new cause of action, it would not be barred since the Plaintiff's Abbreviated Motion for Judgment was originally filed in March 2002. Upon representation of Plaintiff's counsel and agreement by Owens-Illinois that state-of-the-art is a defense to both the negligence cause of action and the claims under strict liability in tort, the Court finds that the Plaintiff's allegations concerning strict liability do not create the need for additional discovery by Owens-Illinois. Owens-Illinois and other Defendants in this cause have argued surprise at the application of admiralty jurisdiction and general maritime law to these actions; however, the Court

finds that these arguments are both unpersuasive and untimely in consideration of the longstanding allegations in Plaintiff's Master Motion for Judgment and the longstanding legal precedents in support of the application of admiralty jurisdiction and general maritime law to these cases.

IT IS FURTHER ORDERED that Plaintiff will be limited to the punitive damages alleged in the Motion for Judgment irrespective of whether punitive damages are allowed or whether maritime law limits such damages. The Court reserves any ruling concerning the sufficiency of the Plaintiff's proof concerning punitive damages until after the Plaintiff has rested her case, and Plaintiff's counsel shall not mention punitive damages in opening statement.

The Court is also in receipt of a Motion by Metropolitan Life Insurance Company to bifurcate the trial of punitive damages as it may apply to these cases as well as a Motion filed by the Plaintiff to exclude the testimony of David T. Wolfe, an expert witness to be called by Owens-Illinois, based on a failure to produce the resource material used by such expert. Because of the limited time available for resolution of several Motions and to expedite this proceeding, the Court will make a preliminary judgment regarding these matters subject to counsel's request for a full hearing. Unless modified after a hearing, the Court, after review of the brief submitted by Metropolitan Life Insurance Company, **DENIES** the request to bifurcate damage issues. Additionally, the expert witness of Owens-Illinois may not testify unless disclosure and production are

made of his resource material and software in sufficient time for proper review by Plaintiff. To the extent that a protective order may resolve the issue, counsel shall confer and agree to subject Order's terms and submit same to the Court for entry.

ENTERED this 26th day of August, 2004.

/s/ H. Vincent Conway, Jr.

I ASK FOR THIS:

/s/

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Pursuant to Rule 1:13 of the Rules of the Supreme Court of Virginia, the signatures of counsel are not required for this order; however, all objections of the parties made at the hearing and in their briefs are hereby incorporated and preserved.

[PLAINTIFF'S EXHIBIT C]

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

IN RE: NEWPORT NEWS CIRCUIT COURT ALL ASBESTOS CASES

CL90-10000W-01
CL90-10000C-03

DEFENDANT JOHN CRANE INC.'S ANSWERS, RESPONSES AND OBJECTIONS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION TO JOHN CRANE INC.

NOW COMES Defendant, John Crane, Inc., by and through its attorneys and for its Answers, Responses and Objections to Plaintiff's First Set of Interrogatories and Requests for Production to John Crane Inc., states as follows:

GENERAL OBJECTION

John Crane Inc. objects to each and every Interrogatory that relates to periods of time, geographical areas, or activities outside the scope of the allegations of the underlying complaint in that such Interrogatory is irrelevant, overly broad, not reasonably calculated to lead to the discovery of admissible evidence, and would impose an unnecessary burden on John Crane Inc., to search out, review, organize and produce information and documents which are not relevant to any issue in

this case, and it would be oppressive to require this party to do so. Defendant has never manufactured, supplied, sold or produced asbestos insulation products. Defendant manufactures engineered sealing products, some of which contained asbestos but which encapsulated the fibers in lubricants, binders and adhesives so as to prevent their release in normal use and installation.

1. State whether or not you are a corporation. If so state your correct corporate name, the state of your incorporation, the address of your principle place of business, the name and address of the person or entity authorized to accept, service of process on your behalf, and whether or not you have ever held a Certificate of Authority to do business in the State of Virginia.

ANSWER: Crane Packing company was organized in Illinois in 1917. It merged with John Crane Houdaille, a Delaware Corporation, on August 3, 1981. On March 27, 1988, Defendant changed its name to John Crane Inc. Defendant does not deny that it is the corporate successor to Crane Packing Company and John Crane-Houdaille, Inc., and therefore objects to any further answer on the basis of relevance.

***

...various sales and engineering employees, under the general supervision of a chief engineer. The persons who performed this function have been as follows:

Paul Teeple	1930's-1944
Merrill Main	1955-1970
Carl Schmitz	1970-1975
Carl Schoenherr	1975-1985

Defendant objects to any further answer on the basis of relevance.

6. Identify all products which contained any amount of asbestos which you designed, manufactured, processed, distributed, sold, relabeled, and/or otherwise placed in the stream of commerce including:

a. the trade, brand name and/or generic name of each type of such product;
b. a specific description of the product, including:
    i. its nature, i.e., pipe insulation, asbestos cable, gasket, etc.;
    ii. its physical appearance, e.g., shape, size, color, texture;
    iii. any logo or marketing on the product;
    iv. its chemical composition;
    v. the type(s) and/or grade(s) of asbestos fiber contained in it;
    vi. the quantitative percentage of the type(s) of asbestos fiber in it;
    vii. any change(s) in the quantitative percentages of the type(s) of asbestos fiber contained in it over the course of time you were involved with it;
    viii. its recommended use(s); and

c. whether you designed, manufactured, processed, distributed, sold, relabeled and/or held a patent on the product;

d. the inclusive date(s) that you first performed and last performed any of the activities described in subpart (c) on each such product;

e. the name of the manufacturer of each such product if the product was not manufactured by you; and

f. the location each plant or manufacturing facility in which the products listed in your answer to Interrogatory No. 6 were manufactured, assembled, or prepared for sale or marketing.

ANSWER: Defendant objects to this Interrogatory as it relates to products that have not been identified in this matter as having been used by or in the presence of plaintiffs, and to identified products insofar as the detail requested if immaterial for the following reasons:

Defendant has designed, manufactured and sold engineered sealing products, some of which contained asbestos, but which encapsulated the fibers in lubricants, binders and adhesives so as to prevent their release in normal use and application. Defendant has designed, manufactured and sold hundreds of prudcts for particular uses and applications in a wide variety of industries, including chemical, oil and gas, food handling and processing, basic metals, automotive, railroads and shipbuilding. To require this Defendant to search

out, review, organize and produce information and documents which are not relevant or material to any issue in this case would be oppressive and unreasonably burdensome. Such information is irrelevant and the Interrogatory is objectionable as being overly broad.

7. As to each product contained within your response to Interrogatory No. 6, identify the following:

a. any and all pertinent trademark that was applicable to the product during any time of its sale;

b. any and all patents that are applicable to the product;

c. any and all blueprints and manufacturing specifications that were applicable to the product;

d. the label on the packaging of that particular product for each year of its manufacture and/or sale;

e. any and all sales catalogues, brochures, specification sheets, performance data or other promotional material, as well as any and all installation materials, data or brochures which would have accompanied or been distributed in connection with the sale, installation, application or use of each such product;

f. the exact manner in which the product was described in such catalogues, brochures, specification sheets or other promotional material for each year it appeared therein (as to this portion of the interrogatory, you may provide a

copy of the document in lieu of describing the same);

g. any and all photographs of the product for which you have knowledge;

h. any and all samples of the product for which you have knowledge; and

i. any and all packaging of the product for which you have knowledge.

ANSWER: Defendant objects to this Interrogatory for the reasons stated in its General Objection, and in its Answer to Interrogatory No. 6.

8. If you distributed, sold and/or otherwise placed in the stream of commerce bulk asbestos fibers, please state:

[PLAINTIFF'S EXHIBIT D]

January 24, 1963

Department of the Navy
Bureau of Ships
Washington 25, D.C.

Attention: Mr. F. M. Gantt,
Head, Specification and
Standardization Branch
Technical Material Div.

Subject: Your Letter Jan. 15, 1963
Ref: #4123/534
#4123/907
Ser 621-4997

Gentlemen:

Thank you for your letter listing the JOHN CRANE packings and qualification reference numbers as covered by Specifications JAN-F-534, MIL-A907, MIL-2863, MIL-P-16374 and MIL-P-17303.

All of the items listed by you are correctly identified as to JOHN CRANE style numbers and qualification reference.

Attached is a copy of our Form P-316-4 which is our listing of approved packings and this may be of help to you. We appreciate this opportunity of reviewing such qualifications.

Yours very truly,

CRANE PACKING COMPANY

V. R. Nelson,
Asst. Salon Manager –
Packing Division

VRN:IS
Att. P-316-4

c.c. H. bracket, PHO

[PLAINTIFF'S EXHIBIT E]

"JOHN CRANE" PACKINGS CONFORMING TO BUREAU OF SHIPS DRAWING B153 ALT. 7. STANDARD PLAN APPLICATION OF PACKINGS AND GASKETS

STYLE OF PACKINGS AND GASKETS	SYMBOL	NAVY SPEC	TYPE	JOHN CRANE		CERTIFICATE OF APPROVAL NUMBER	MILITARY OR OTHER SPECIFICATION NUMBER
				NAVY APPROVED STYLE	SIMILAR STYLE NOT APPROVED		
Asbestos, Rod, High Pressure	1100	33P16			800		
Asbestos, Rod, Braided, Plain	1103	33P26	I	810			HH-P-
Asbestos, Rod, Braided, Wire Insert	1104	33P26	II	801N			HH-P-
Plastic, Non-Metallic, Without Cotton Jacket	1106	33P25	B-Class 2		SS6		Mil-P-
Plastic, Non-Metallic, Asbestos and Wire Jacket	1108	33P25	C-Class 2	6AMCR		EES-610033A	Mil-P-
Conical Packing	1110	33P38			4V		Mil-P-

Style of Packings and Gaskets	Symbol	Navy Spec	Type	John Crane		Certificate of Approval Number	Military or Other Specification Number
				Navy Approved Style	Similar Style Not Approved		
Vee Type Packing	1220	33938			Everseal		Mil-P-
Plastic, Non-Metallic, Asbestos & NiChrome Iron Wire Jacket	1111		E-Class 2	187-1		EES-010033	Mil-P-
Flax Braided	1260	33P1		863N			{Mil-P- {HH-P-
Ramic Packing	1290	33P42			963		Mil-P-
Plastic, Spiral, Low Pressure	1300	33P12			None		Mil-P-
Hydraulic, Flexible, Square (Formerly Tucks)	1301	33P7	A		843		Mil-P-
Hydraulic, Rock Hard, Square (Formerly Tucks)	1303	33P7	B		845		Mil-P-

Style of Packings and Gaskets	Symbol	Navy Spec	Type	John Crane		Certificate of Approval Number	Military or Other Specification Number
				Navy Approved Style	Similar Style Not Approved		
Semi-Metallic, Asbestos Jacket	1400	33P19			300		Mil-P-
Semi-Metallic, Cotton Duck Jacket	1402	33P19			400		
Stern Tube Semi-Metallic	1405	33P33		140		EES-610582A	Mil-P-
Plastic Packing (For Dogs, Water-tight Closures)	1425	33P29	I-Sticks	77MC		Ismat Pgh. 116	Mil-P-
Plastic Packing (For Dogs, Water-tight Closures)	1425	33P29	II-Sticks	77MC		Ismat Pgh. 116	Mil-P-
Plastic Packing (For Dogs, Water-tight Closures)	1425	33P29	III-Bulk	77MC		Ismat Pgh. 116	Mil-P-
Plastic Packing (For Dogs, Water-tight Closures)	1425	33P29	IV-Sets	77MC		Ismat Pgh. 116	Mil-P-

Style of Packings and Gaskets	Symbol	Navy Spec	Type	John Crane		Certificate of Approval Number	Military or Other Specification Number
				Navy Approved Style	Similar Style Not Approved		
Metallic, Flexible	1430			41		EES1J00 6749	Mil-P-
Plastic Metallic, Lead Base, Braided	1432	33P25	D-Class 1	250N		EESC522	Mil-P-
Plastic Metallic, Lead Base, Without Cotton Jacket	1433	33P25	B-Class 1	SS1		{EES-5001 F {EES8942	Mil-P-
Plastic Metallic, Lead Base, Metal Foil	1434	33P25	C-Class 1	150N		EES3907	Mil-P-
Flexible-Metallic, Condenser Tube	1435	33P15	Grade A	601-E & 602		EES2225	Mil-P-
Cup Leathers	1600	(2)			None		
Carbon, Rings or Plates	1700	33P18			None		

Style of Packings and Gaskets	Symbol	Navy Spec	Type	John Crane		Certificate of Approval Number	Military or Other Specification Number
				Navy Approved Style	Similar Style Not Approved		
Asbestos Sheet, Compressed	2150	33P13			2150		Mil-
Asbestos-Metallic Cloth, Sheet	2151	33P2			222		Mil-
Asbestos-Metallic Cloth, Gasket	2152	33G2			873		Mil-
Asbestos-Metallic Cloth, Tape	2153	33P2			878		
Plant or Animal Fiber Sheet	2290	33P22			444		Mil-
Rubber-Graphite, Unvulennized Sheet	2352	33P23			None		Mil-
Rubber Sheet, Cloth Insertion	2355	33P8			777		Mil-

Style of Packings and Gaskets	Symbol	Navy Spec	Type	John Crane		Certificate of Approval Number	Military or Other Specification Number
				Navy Approved Style	Similar Style Not Approved		
Gaskets, Metallic-Asbestos, Spiral Wound (For Boiler Manholes and Handholds)	2410	33G11			None		Mil-
Gaskets, Metallic-Asbestos, Spiral Wound (For Flanged Joints in Piping Systems)	2410	33G5			None		HH-G-101
Gaskets, Metallic-Encased	2411	33G4			None		
Gasket, Metal, Serrated	2470	(1)			None		
High Temperature Joint and Thread Compound		52C14			None		
Canvas, Cotton		24C8			None		

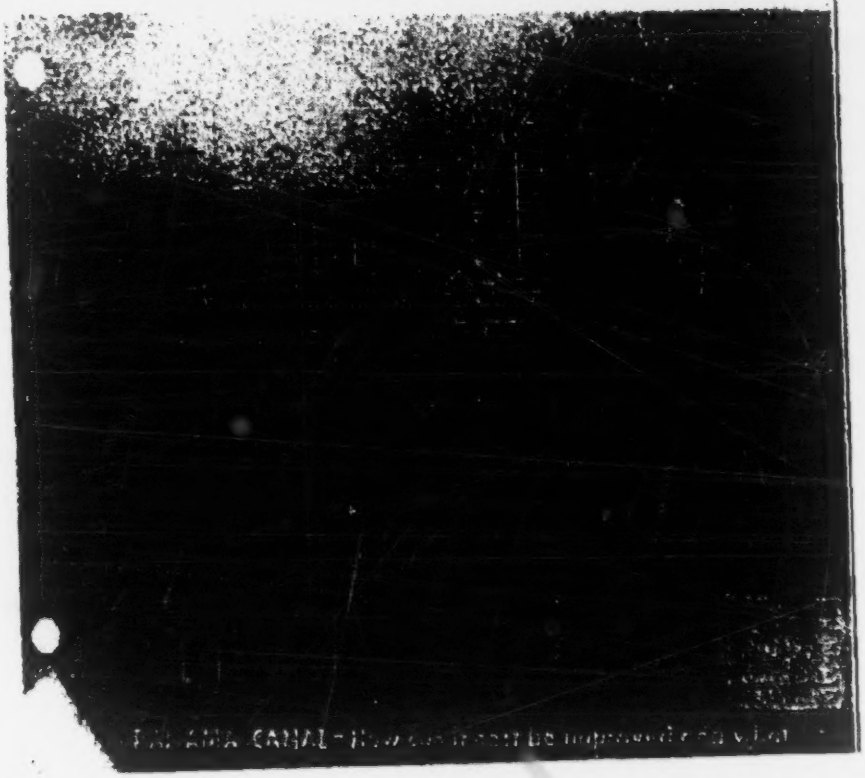
Style of Packings and Gaskets	Symbol	Navy Spec	Type	John Crane		Certificate of Approval Number	Military or Other Specification Number
				Navy Approved Style	Similar Style Not Approved		
Gaskets, Rubber, Molded, Metal-inserted (for Armored Hatches)		33G6			None		Mil-G-20078
Gaskets, Oil-Resisting (Sheet, Molded & Strip)		33G7			999		Mil-G-2765
Gaskets, Metallic-Asbestos Cover, Rubber Core		33G8			None		
Rubber, Sheet & Strip	2351	33R1			555		JAN-R-1149
Packing, Stuffing Tube (For Asbestos Covered and Armored Electric Cable) String Form		33P28	Part A	4810		EES-B-8637	{JAN-P-534 {Mil-P-166858

25 PERCENT.....

HOW TO CUT TAILSHA

REPAIRS.....

Marine Engineering/LOG



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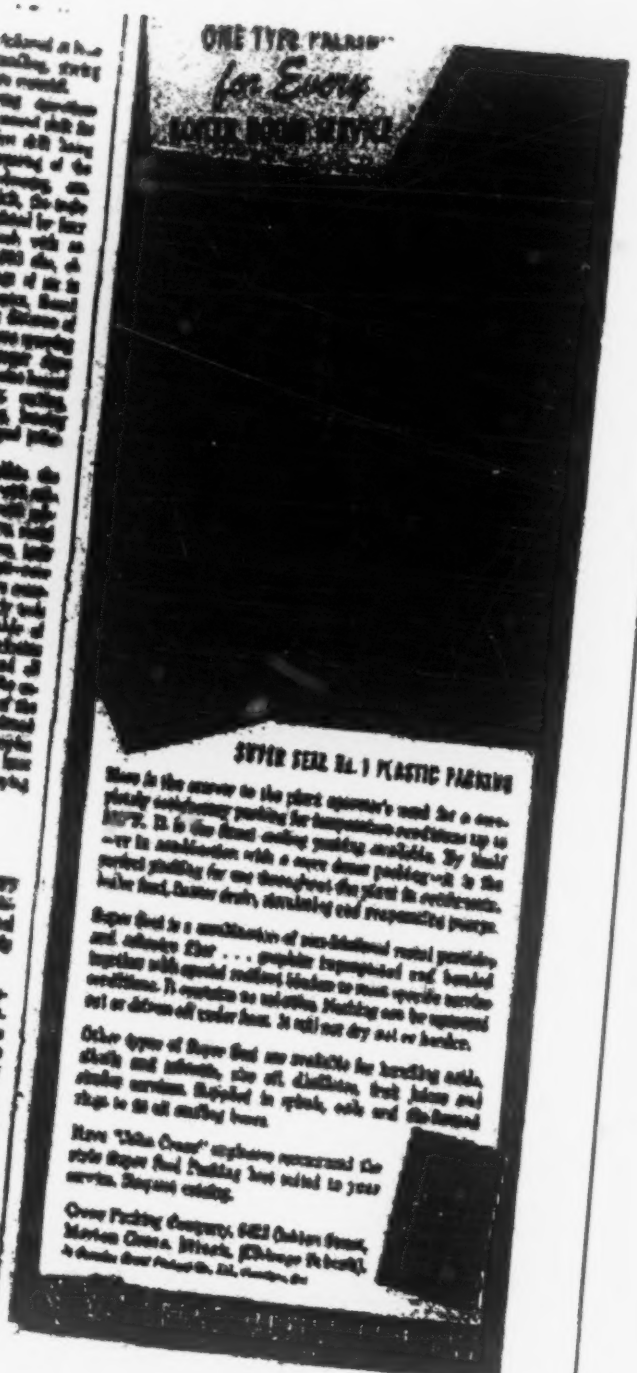
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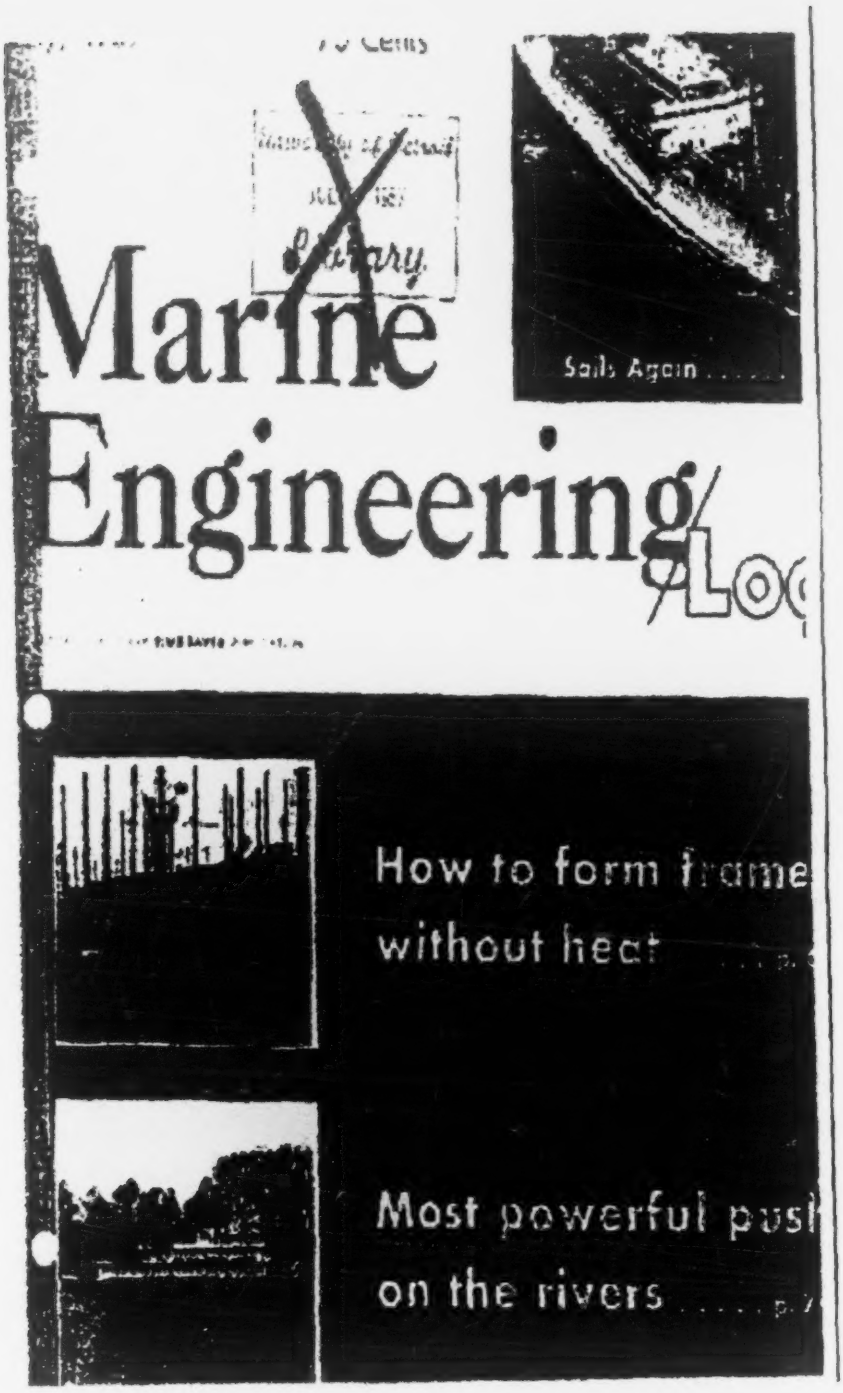
for Every
SUPER SEAL No. 1 PLASTIC PACKING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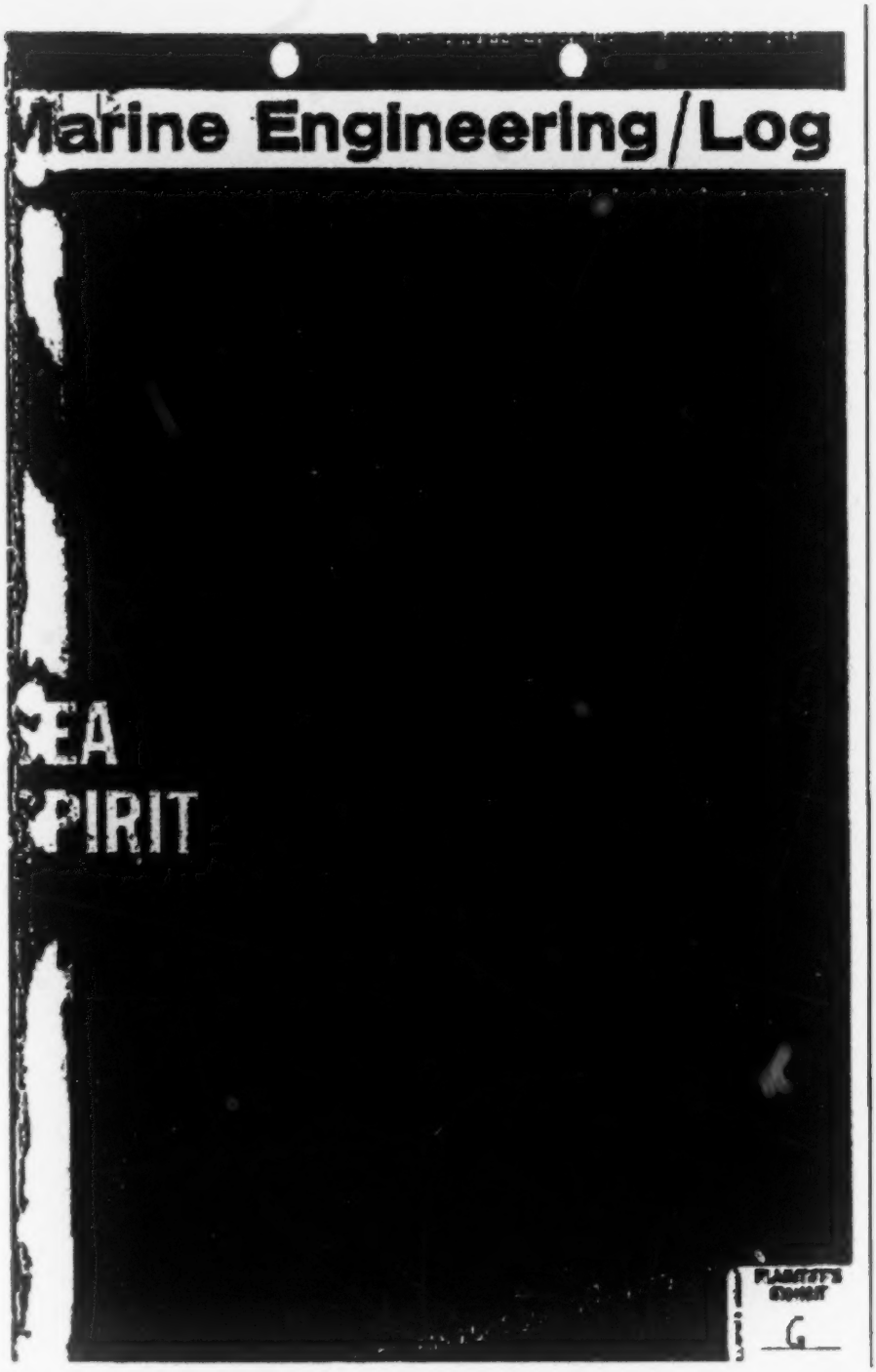

Marine Engineering/Log
SEA
SPIRIT
PLAINTIFF'S
EXHIBIT
G

Robert W. Van Tuyle Dr. Lucian S.

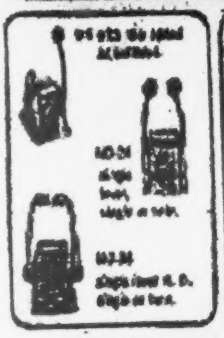
ROBERT W. VAN TUYLE has elected president of Dravo Corporation, and Joseph P. Hazlett has elected to the new post of Dravo president. Mr. Van Tuyle succeeds Mr. Forsyth, who will continue chairman. Mr. Van Tuyle former vice-president in charge of marine operations activities at Dravo has been 20 years the Corporation and occupied corporate at a time when and has been a vice-president director since 1951.

DR. LUCIAN SYNAN has been named technical director for the Company Research coordinates subsidiaries' industrial and metals Dr. Synan is leaving Portland, Or., was with Reynolds Company Texas

BRUCE M. CUTRESS has been named vice-president in charge of Building Products, in the expanding mill with wide-flared sections, pre-panels, strip engineers and erection of curtain equipment sales and installation and more. Prior to his 19 years, Mr. Cutress served as marketing for Bliss Manufacturing after 14 years service with the Bendix Company of Elmira (now Corp.). He is a Yale Engineering and has an MS Professional Engineer and Steel Rules, New York

. . . "Engineering I.Q." answers

1 (c)
2 True.
3 True. The British call 'em valves
4 True.
5 True.
6 False.
7 True.
8 True.
9 True.
10 False. Handbook used by experts



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MORSE

Style of Packings and Gaskets	Symbol	Navy Spec	Type	John Crane		Certificate of Approval Number	Military or Other Specification Number
				Navy Approved Style	Similar Style Not Approved		
Packing, Stuffing Tube (For Asbestos Covered and Armored Electric Cable) String Form		33P28	Part B	77CKX		EES-C-313F	{JAN-P-534 {Mil-P-166858
Packing, Stuffing Tube (For Asbestos Covered and Armored Electric Cable) String Form		33P28	Part D	100D			
Packing, Stuffing Tube (For Asbestos Covered and Armored Electric Cable) Performed Sets		33P41		4877		EES-C-313M	{JAN-P-534 {MIL-P-166858

Style of Packings and Gaskets	Symbol	Navy Spec	Type	John Crane		Certificate of Approval Number	Military or Other Specification Number
				Navy Approved Style	Similar Style Not Approved		
Packing, Stuffing Tube (For Asbestos Covered and Armored Electric Cable) Preformed Sets		33P28		48771			
et, Medium Soft (For Gaskets)		33R4			11B		Mil-R-880
er, Zinc Chromate		52C18			None		
er Tube Packing	1435	33P15	Grade B	601ECA		EESB-886	Mil-P-2863
enser Tube Plugs, Phenolic Laminated	None	45P3	609				Mil-P-15742A
Sieze Compound	None			Thred-Gard			Mil-A-907B

Style of Packings and Gaskets	Symbol	Navy Spec	Type	John Crane		Certificate of Approval Number	Military or Other Specification Number
				Navy Approved Style	Similar Style Not Approved		
aulic Packing for Phosphate ters – Cotton Duck & Vyran	None		II	920		EES6102 76F	Mil-P-21099
– Cotton Duck & Butyl	None		II	930		EES6102 76F	Mil-P-21099
– Braided Asbestos with flan Suspensaid Lubrication	None			C06		EES6102 76D	Mil-P-21099
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VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF NEWPORT NEWS

Wanda T. Jones, Administratrix of the Estate of GARLAND F.JONES, JR., Deceased

Plaintiffs,

v.

Case No. 39028T-01

GARLOCK SEALING TECHNOLOGIES, et al.

Defendants.

JOHN CRANE, INC.'S MOTION TO APPLY VIRGINIA LAW AND MEMORANDUM IN SUPPORT

This is a products liability case. The thrust of plaintiff's case is that John Crane, Inc. manufactured products containing asbestos which, during their intended and ordinary use, released asbestos fibers, which, when inhaled, caused injury to plaintiffs decedent decades later. The facts of this case are no different than in any other asbestos exposure case, except for where the plaintiff's inhalation of asbestos occurred. John Crane, Inc. submits that in the instant case, Virginia law should apply rather than maritime law. In support of its motion to apply Virginia law, John Crane, Inc. submits the following memorandum.

MEMORANDUM IN SUPPORT SUMMARY OF JOHN CRANE. INC.'S POSITION

While the Virginia Supreme Court has recently spoken on the application of Maritime jurisdiction in a shipyard setting, *Garlock Sealing Technologies, LLC* v. *Little*, 270 Va. 381 (2005), the Court did so without considering the relationship of the wrong involved with traditional maritime activities. Had it done so, John Crane submits, the court would have come to a different conclusion, one in keeping with the precedent established by the U.S. Supreme Court, and in so doing, would not have applied admiralty law to a garden variety asbestos product exposure case without first determining that the wrong bore some relationship to traditional maritime activity.

ARGUMENT

I. HISTORICAL DEVELOPMENT OF ADMIRALTY JURISDICTION TEST AND ITS CURRENT STATE

Historically, the test for admiralty tort jurisdiction centered on one question only: did the tort occur on navigable waters? If the answer was yes, admiralty jurisdiction followed. If the answer was no, admiralty jurisdiction did not exist. *See e.g.*, *Martin* v. *West*, 222 U.S. 191 (1911). In 1948, Congress modified this jurisdictional rule to gather the odd case that did not fit under the "place where" test into admiralty by enacting the Extension of Admiralty Jurisdiction Act, found at 46 U.S.C. § 740. The Act provided that "[t]he admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage

or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." The Act invested the admiralty courts with jurisdiction over cases where the injury was caused by a ship or other vessel on navigable water, even if such injury occurred on land. *See e.g.*, *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 209-210 (1963).

Beginning in 1972, "the jurisdictional rule was qualified again in three decisions of [the United States Supreme Court] aimed at keeping a different class of odd cases *out*." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 532 (1995) (emphasis added). Those cases were *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249 (1972), *Foremost Insurance Company v. Richardson*, 457 U.S. 668 (1982), and *Sisson v. Ruby*, 497 U.S. 358 (1990).

In *Executive Jet*, tort claims arose out of the wreck of an airplane when it collided with a flock of birds at takeoff causing it to fall into the navigable waters of Lake Erie. The U.S. Supreme Court refused to apply "a purely mechanical application of the locality test," because such an application would not always render a result "consonant with the purposes of maritime law." *Executive Jet*, 409 U.S. at 261. The Court held that in addition to the traditional situs test (the place where), the tort also had to have a nexus with maritime activity, noting that

> the mere fact that the alleged wrong 'occurs' or 'is located' on or over navigable waters — whatever that means in an aviation context - is not of

> itself sufficient to turn an airplane negligence case into a 'maritime tort'. It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity. We hold that unless such a relationship exists, claims arising from plane accidents are not cognizable in admiralty in the absence of legislation to the contrary.

Although the holding in Executive Jet was specifically limited to aviation tort claims, the Court's decision in the second of the three cases, *Foremost Insurance Company* v. *Richardson*, expanded the nexus requirement enunciated in *Executive Jet* by saying the nexus principle stated applied generally to all torts occurring on navigable waters and not just airplane crashes. *Foremost*, 457 U.S. at 674.

In *Foremost*, the tort claims arose out of the collision of two pleasure boats in a navigable river estuary. Although the Court noted that "the protection of maritime commerce" is the "primary focus of admiralty jurisdiction," the federal interest in protecting maritime commerce "can be fully vindicated only if all operators of vessels on navigable waters are subject to uniform rules of conduct." *Foremost*, 457 U.S. at 674-75. The Court found that the "potential disruptive impact of a collision between boats on navigable waters, when coupled with the traditional concern that admiralty law holds for navigation, compels the conclusion" that a collision between two

pleasure boats has a significant relationship with maritime commerce *Foremost*, 457 U.S. at 675.

In the third case, *Sisson v. Ruby*, 497 U.S. 358 (1990), the tort claims arose when a fire, caused by a defective washer/dryer aboard a pleasure boat docked at a marina, burned the boat, other boats docked nearby, and the marina itself. *Sisson*, 497 U.S. at 367. In Sisson, the Court construed the nexus test as requiring a two part inquiry. The first inquiry required the court to "assess the general features of the type of incident involved to determine whether such an incident is likely to disrupt commercial activity." *Sisson*, 497 U.S. at 363. Under the second part of the inquiry "the party seeking to invoke maritime jurisdiction had to show a substantial relationship between the activity giving rise to the incident and traditional maritime activity." *Id.* at 364. As a first step, the court must define the relevant activity in the case. *Id.* The relevant activity is defined by the general conduct from which the incident arose. *Id.*

Five years after *Sisson*, in *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995), the Supreme Court attempted to clarify the *Sisson* test. The tort in Grubart involved negligent pile-driving from a barge in the Chicago River, causing a tunnel under the river to collapse and a flooding of nearby buildings. The Grubart court explained that the first Sisson test turns on "a description of the incident **at an intermediate level of possible generality**." *Grubart*, 513 U.S. at 538. The Court warned against describing the incident in terms that were too general. Using the incident in the

Sisson case as an example, the Court stated that "[t]o speak of the incident as 'fire' would have been too general to differentiate cases." *Id.* The Court also rejected the opposite extreme. "[T]o have described the fire as damaging nothing but pleasure boats and their tie-up facilities would have ignored, among other things, the capacity of pleasure boats to endanger commercial shipping that happened to be nearby." *Id.* at 538-539. As the Court explained, "[although there is inevitably some play in the joints in selecting the right level of generality when applying the Sisson test, the inevitable imprecision is not an excuse for whimsy." *Id.* at 542. The crucial question is "whether the incident could be seen *within a class of incidents* that posed more than a fanciful risk to commercial shipping." *Id.* at 539 (emphasis added).

The opinion in Grubart also further elucidated the second Sisson inquiry, which asks whether the "general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity." *Grubart*, 513 U.S. at 539. The Court explained that the focus of this inquiry is on the tortfeasor's activity which led to the injury or damage. "We ask whether a tortfeasor's activity, commercial or noncommercial, on navigable waters is so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the suit at hand." *Id.* at 539-540.

In neither inquiry under Sisson did the court focus on the plaintiffs activity or the plaintiff himself, as Virginia did in *Little.* Instead, Sisson cited Foremost saying that the wrong committed by the

tortfeasor (not the activity of the injured party) was the crucial point that had to have a significant connection with traditional maritime activity. *Foremost*, 457 U.S. at674. Specifically, in Foremost, the Court said "[b]ecause the 'wrong' here involves the negligent operation of a vessel in navigable waters, we believe that it has a sufficient nexus to traditional maritime activity to sustain admiralty jurisdiction." *Grubart*, 513 U.S. at 541 (quoting, *Foremost*, 457 U.S. at 674). The *Grubart* Court also noted that "[t]he substantial relationship test is satisfied when at least one alleged tortfeasor was engaging in activity substantially related to traditional maritime activity and such activity is claimed to have been a proximate cause of the incident." *Id.*

II. WHAT HAPPENS WHEN THE FACTS OF THIS CASE ARE COMPARED TO THE REQUISITE TESTS FOR ADMIRALTY JURISDICTION?

A. The tort occurred on navigable water.

In the present case, the plaintiff has alleged exposure to asbestos in the course of his employment as an outside machinist at Newport News Shipbuilding & Drydock Company from 1963-1967. (Par. 2, Amended Motion for Judgment) Plaintiff's co-workers place him on the construction of the aircraft carrier USS America in the 1963-1965 timeframe. This work took place in the drydock area of the shipyard and on the James River at the yard's piers once the ship was launched. Without conceding that the exposures were on a navigable waterway, since

most, if not all, of plaintiff s exposures were on and in the shell of the nescient USS America, for purposes of this brief, John Crane, Inc. is willing to stipulate that the allegations of "place where" meet the location test of *Executive Jet* and its progeny. It is in the nexus area that our disagreements lie.

B. In analyzing the first nexus inquiry, the general type of incident at issue here is not "of a sort likely to disrupt maritime commercial activity."

According to Grubart, the first maritime connection inquiry is whether the incident involved is of a sort that has the potential to disrupt maritime commerce. *Grubart*, 513 U.S. at 538. The language used by the U.S. Supreme Court is not immediately helpful. It speaks in terms of an intermediate level of possible generality, and focuses on the "general features" of the incident. While the language appears laced with ambiguity, it is without question that the court is saying that the first step of a jurisdictional inquiry is to describe the incident that might give rise to a disruption of maritime commerce. Is the incident the plaintiff's activity? We submit that it is not. Or, must the incident relate to some wrong embedded in the actions or failures of the defendant? We submit that is the proper approach. Regardless, in either event, the same result yields.

From the plaintiff's perspective the features of the incident at issue here may be described in general terms as the exposure of a machinist engaged in the construction of an aircraft carrier to asbestos fibers in

the dry dock area of Newport News Shipbuilding's Shipyard or while tied up at a pier there after launch. While Newport News Shipyard abuts the James River, a navigable waterway, the docks, construction piers and drydock are away from and not a part of the usual navigable portions of the waterway. As such, they are not a threat to disrupt maritime commerce.

As an initial matter, it should be noted that in a new construction setting the mere exposure to asbestos has little or no potential to disrupt maritime commerce. The mere fact there has been some exposure does not mean that the exposure will inevitably lead to health problems. In most cases it does not. It is a significant feature of the incident at issue here that the exposures claimed as harmful occurred without the worker's knowledge and without any consequence for shipping. In fact, the harmful event, a mesothelioma could only occur long after Mr. Jones had left the waterway because of the latency of the disease. See Master Motion for Judgment ¶ 7 (alleging that "the Plaintiff was not aware of the nature and extent of the danger to his/her... general health that would result from his/her... exposure to and inhalation of the asbestos dust and fibers .. .."). For proof of the long latency between exposure and the onset of any injury, see *Bartel v. John Crane, Inc.*, 316 F.Supp. 2d 603,610 (N.D. Ohio 2004) which noted that mesothelioma is a disease that has a latency period of <u>at least</u> 15 years.

Without an immediate harm or some contemporaneous awareness of the deleterious nature of the exposure itself, and without some awareness of possible future harm, as far as the workers were

concerned, and as far as maritime activity is concerned, there was no incident threatening traditional maritime activity. Moreover, the injury did not occur while the worker was engaged in the construction. The ship was built. It was launched and delivered. It serves in the fleet of the US Navy even unto this day. The injury alleged did not occur for decades. Mr. Jones' work continued as usual long after his exposure. In short, the exposure was a "non-event" in terms of disruption — disruption to the tasks of the individual worker or other workers, disruption to the work flow or other activities on the vessel, and disruption to other vessels, or disruption to any other aspect of maritime activity.

If a tort produces no potential threat to maritime commerce, the objectives of admiralty jurisdiction can not require its exercise, even if the location test is satisfied. *Grubart*, 513 U.S. at 545. Accordingly, the Supreme Court of Virginia's ruling in *Garlock Sealing Technologies, LLC, v. Little*, 270 Va. 381 (2005), a case with facts very similar to the one at bar, appears to be misguided.

It is in the second aspect of *Grubart's* discussion of the Sisson tests that *Little* clearly misses, in *Little,* Virginia's Supreme Court correctly cited the *Sisson* rule that, "in order to determine whether an activity has a significant relationship to a traditional maritime activity and a potentially disruptive impact on maritime commerce... the relevant activity is determined by the general conduct from which the incident arose." *Little*, 270 Va. at 386. Unfortunately, Virginia failed to select the appropriate activity for its test. The Little Court

selected "ship repair" as the general conduct from which the incident arose. Having made this selection, the Court determined that "ship repair" was an activity that has a "potentially disruptive impact on maritime commerce." Simply stated, the court chose the wrong activity.

In selecting the general categorization of "ship repair," the Court ignored Grubart's rule which prescribes that such categorization should be made using an intermediate level of generality. Using new ship construction as the class of activity under scrutiny, it will, inevitably lead to a finding that such an activity will likely disrupt maritime commerce. But, if the more relevant level of generalization is used, the tortious conduct of the defendant, such a selection will inevitably lead to a different result. The fact that the plaintiff was building new ships at the time of his alleged exposure is not the relevant test for his eventual injury. Instead, the relevant activity has to be what was the wrong that caused the injury. This leads to the question of what products did he use? Were they defective at the time of manufacture? Were they adequately warned of when placed into the stream of commerce? If these are the wrongs, and they are the wrongs alleged, the controlling activities for a nexus determination of necessity must move hundreds of miles inland from any navigable waterway of the James River to the places of manufacture, sale and shipment of the allegedly defective products.

Under a correct reading of the generalization required, "ship repair" can not be the triggering event. It must always be the manufacture and placement of

defective products into the stream of commerce. Such a categorization will recast all of the contributing factors in the plaintiff's injury so as to prioritize their relevance; the injury did indeed happen during the course of the plaintiffs employment on navigable waters, but it was the use of allegedly defectively manufactured inadequately warned about products which caused plaintiffs injury, not his acts on board ship. Moreover, the products in question are allegedly defective not because they were inadequate to do what they were designed to do, but because they caused serious long-term health problems in the workers who used them. As explained in detail above, the threat of long-term health problems caused by such work present no more than a fanciful risk to maritime commerce.

An exception to this rule can be carved out for products made and intended for use specifically in a maritime setting. Such a determination may require evidence from a trial or through discovery and the pre-trial filings required in this case. A review of (1) John Crane's Product Brochures, Exhibits 3-11 in its list of Exhibits pre-filed with this court and (2) plaintiff's Newport News Shipbuilding Purchase Invoices, related to John Crane Exhibits JC 252.1-JC 252.16 from the plaintiff's list of Exhibits filed herein fail to show any product manufactured by John Crane purportedly involved in this case was ever manufactured or intended for use solely in a maritime setting.

The Court's second critical error in *Little* is that it failed to follow the *Sisson* rule, as modified in *Grubart*, which said:

> In the second *Sisson* inquiry, we look to whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity. We ask whether a tortfeasor's activity, commercial or noncommercial, on navigable waters is so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the suit at hand.

Grubart, 513 U.S. at 534 (citations omitted) (underline added).

As *Grubart* further explained, "[t]he test turns on the comparison of traditional maritime activity to the arguably maritime character of the tortfeasor's activity." *Id.* at 542.

Grubart also noted the controlling aspect of the wrong in acting *Foremost*:

> [I]n *Foremost*, we said that "because the 'wrong' here involves the negligent operation of a vessel on navigable water, we believe that it has a sufficient nexus to traditional maritime activity to sustain admiralty jurisdiction...." By using the word "involves," we made it clear that we need to look only to whether one of the arguably *proximate causes* of the incident originated in the maritime activity of a tortfeasor: as long as one of the putative tortfeasors was

> engaged in traditional maritime activity the allegedly wrongful activity will "involve" such traditional maritime activity and will meet the second nexus prong.

Grubart, 513 U.S. at 541 (emphasis added).

With only *Executive Jet* to guide it. *Oman v Johns Manville*, 764 F.2d 224 (4th Cir. 1985), came to the right conclusion in saying admiralty did not apply to a Newport News Shipbuilding case. *Oman* noted the clear intent of the nexus considered was to confine admiralty law to those things it had been "designed and molded to handle," i.e., the "problems of vessels relegated to ply the waterways of the world..." such as navigational rules, maritime liens, seaworthiness, cargo damage, maintenance and cure, captures and prizes, claims for salvage acting. *Executive Jet,* 409 U.S. at 269-70). *See also Eagle-Picker vs. United States,* 846 F.2d 888 (3rd Cir. 1988). In short, defendants' alleged activities are not the traditionally maritime activities which admiralty law was designed to handle.

Plaintiff alleges that the proximate cause of plaintiffs death was exposure to and inhalation of asbestos dust and fibers from products manufactured by John Crane, Inc. See Twenty-First Master Motion for Judgment ¶ 5 and 7(a). Plaintiff also alleges that the products manufactured by John Crane, Inc. were inherently dangerous or defective and defendants failed to warn plaintiff. As stated in *Foremost*, the wrong committed by the tortfeasor must have a significant connection with traditional maritime

activity. *Foremost*, 457 U.S. at 674. Here, the wrong alleged was the manufacture of asbestos products and a failure to warn, activities that traditionally have had no significant connection with traditional maritime activity.

In revisiting *Little*, Virginia Supreme Court did say that to satisfy a nexus test that "the wrong (had to) bear a significant relationship to traditional maritime activity... Having stated the law correctly, the *Little* court then focused on ship repair instead of the wrong to determine jurisdiction. The *Little* court also cited *Mizenko v. Electric Motor & Contracting Co.*, 244 Va. 156, 419 S.E.2d 637 (1992) as an earlier finding of the same rule it was enunciating in *Little*. In *Mizenko* the court said, to support a cause of action for a maritime test which falls within admiralty jurisdiction, the alleged negligence must occur on the navigable waters of the United States and the wrong must bear a significant relationship to traditional maritime activity. In spite of stating the law correctly, *Mizenko* also used as its wrong ship repair and/or the act of inhalation, neither of which was the wrong involved. Here, the wrong alleged is not ship repair but the negligent manufacture, sale and placement of asbestos containing products into the stream of commerce. Because the Supreme Court of Virginia let the situs control in all aspects of its decision about maritime jurisdiction in both *Mizenko* and *Little*, Virginia has not spoken on the issue aside from situs and its decisions should not be used as precedent in this case to establish jurisdiction.

As a final point, the defendant John Crane, Inc. submits that it has performed no activities "on

navigable water" as required by the second prong of the nexus inquiry. John Crane, Inc. is a manufacturer of heat resistant packing and gasket products, some of which contained asbestos. Its gasket products are designed for use any where two pieces of metal come together. Its packing and gasket products are designed for use anywhere there is a heat or liquid application. Their use is not specifically maritime in nature. John Crane's activity in manufacturing broad general application products has no significant connection with traditional maritime activity in and of itself.

In sum, the relevant activity in this case, the negligent manufacture and placement of asbestos containing products into the stream of commerce, and the contended use of those products do not satisfy the second inquiry of the nexus test to permit the invoking of admiralty jurisdiction so that Virginia law must apply.

CONCLUSION

In conclusion, maritime law should not be applied in this case because the facts alleged do not satisfy both prongs of the United States Supreme Court's nexus inquiry for admiralty jurisdiction.

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In The Supreme Court of the United States

JOHN CRANE INC.,
Petitioner,

v.

WANDA T. JONES,
Administratrix of the Estate of
GARLAND F. JONES, JR., Deceased,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION

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NATURE OF THE CASE AND MATERIAL PROCEEDINGS

John Crane asks this Court to exonerate manufacturers from general maritime product liability actions by revisiting, for the fourth time, the contours of its decision in *Executive Jet*. But these contours are already well-defined, particularly for cases like this one involving injuries on vessels on the navigable waters of the United States.

Garland F. Jones, Jr. was diagnosed with malignant mesothelioma caused by asbestos exposure from fabricating, installing, and removing marine gaskets and packing in the engine rooms of ships and submarines during repair and construction work on the navigable waters of the James River at Newport News Shipbuilding and Dry Dock Company. On March 21, 2005, he filed an Amended Complaint alleging maritime claims for negligent failure to warn and strict liability under Restatement (Second) of Torts § 402A, and pendent state law claims of breach of implied warranty and conspiracy against John Crane, Inc. and others. Jones died from mesothelioma on July 26, 2005, and his widow, Wanda Jones, amended and revived the action as a maritime wrongful death case on September 7, 2005.

Before trial, John Crane moved to apply Virginia law rather than maritime law. The trial court adhered to its previous rulings finding maritime jurisdiction in cases involving shipyard workers exposed to asbestos while conducting repair and construction operations on launched vessels on

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navigable waters. The Virginia Supreme Court had already affirmed these jurisdictional rulings once in *Garlock Sealing Techs. LLC v. Little*, 620 S.E.2d 773 (Va. 2005), and the argument in this case occurred against the backdrop of *Little*. *See, e.g, Petition*, at 31a-38a (citing *Little*), 40a ("Rather than rehashing all of the arguments made [in *Little*], the Plaintiff will address two new points raised by John Crane's brief . . . .").

After a three week trial in July 2006, the jury returned a general compensatory verdict of $10,000,000, awarded $400,000 for stipulated medical and funeral expenses, and allocated 34% of the total verdict to John Crane. The court reduced the verdict to $10,000,000. John Crane's share amounted to $3,400,000 plus interest.

John Crane appealed the verdict, *inter alia*, on grounds that the trial court erred in ruling that the case arose under maritime jurisdiction. The Virginia Supreme Court granted John Crane's appeal and unanimously reaffirmed its prior decision in *Little* that tort claims involving shipyard workers injured by inhaling asbestos during the repair and construction of launched vessels on navigable waters may arise under maritime jurisdiction.

STATEMENT OF FACTS

Garland Jones worked as a machine installation worker at Newport News Shipbuilding and Dry Dock Company (the Shipyard) in Virginia from 1963 to 1967. While at the shipyard, the uncontroverted evidence showed, Jones worked on

the USS AMERICA and USS JOHN F. KENNEDY aircraft carriers, and the USS HENRY CLAY, USS JOHN C. CALHOUN, USS SIMON BOLIVAR, and USS QUEENFISH submarines. By the time Jones went aboard these vessels, they had already been launched and were moored adjacent to the shipyard on the navigable waters of the James River in Southeastern Virginia.[1] Jones also performed repair work on the BELGIUM VICTORY, GAINSVILLE VICTORY, MAIDEN VICTORY, NEWCASTLE VICTORY, and GRINNELL VICTORY. *See, e.g.*, *John Crane, Inc. v. Jones*, 650 S.E.2d 851, 588 n.4 (Va. 2007) ("The record shows that Garland Jones' exposure to asbestos occurred while working on new vessels and repairing existing vessels.").

As a machinist, Jones installed and repaired valves, put packing in the valves to prevent or repair leaks, and installed or replaced gaskets in pipes to prevent or repair leaks. He primarily worked in the engine rooms of ocean going vessels and routinely handled asbestos-containing products, including gaskets and packing materials manufactured by John Crane. John Crane's products contained between 50% and 85% asbestos. John Crane never warned Jones that breathing asbestos dust from machining, abrading and grinding its products was dangerous.

In January 2005, Jones was diagnosed with malignant mesothelioma. "Mesothelioma is 'a signal

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[1] In the trial court, John Crane persisted in contending that Jones' exposure occurred "in the dry dock area" of the shipyard. *See Petition*, at 97a. There is no evidence that Jones ever worked on ships in dry dock.

tumor' for asbestos exposure, and there is 'virtually no other cause of mesothelioma.'" *Little*, 620 S.E.2d at 775. The disease "has a latency period of 15 to 50 years or more following the first exposure to asbestos fiber." *Id.* John Crane's causation experts agreed that asbestos caused Jones' mesothelioma. And the evidence at trial demonstrated that Jones was exposed to asbestos on vessels on navigable waters.

Jones filed a product liability action in Newport News Circuit Court against John Crane and others. Prior to trial, John Crane moved to apply Virginia law rather than maritime law. Stipulating that the *situs* test of maritime jurisdiction was satisfied, John Crane argued there was no maritime connection. *Petition*, at 95a-96a. The trial court denied John Crane's motion and held that this case arose under maritime jurisdiction. John Crane appealed this ruling to the Virginia Supreme Court, which unanimously affirmed the trial court and reaffirmed its prior opinion in *Little*.

In its Petition in this Court, John Crane claims it was prejudiced because maritime law and Virginia law "differ radically." *Petition*, at 5. In fact, John Crane notes only two differences: pain and suffering damages, and a different standard of care. With regard to pain and suffering, except for $400,000 specifically awarded for medical and funeral expenses, the bulk of the $10,000,000 verdict was awarded for general compensatory damages. Harmonizing maritime and Virginia law pursuant to *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 216 (1996), the trial court instructed the jury, without objection, that it might award damages for

each category set forth under the Virginia Wrongful Death Act, Virginia Code § 8.01-52, as well as damages for Jones' pre-death pain and suffering under maritime law's survival provisions. *See Moragne v. State Marine Lines*, 398 U.S. 375 (1970); *Spiller v. Thomas M. Lowe, Jr. & Assoc., Inc.*, 466 F.2d 903, 909 (8th Cir. 1972); *Dennis v. Central Gulf Steamship Corp.*, 453 F.2d 137, 140 (5th Cir. 1972); *see also Jerome B. Grubart, Inc. v. Great Lakes Dredge &Dock Co.*, 513 U.S. 527, 545 (1995) (noting that "exercise of federal admiralty jurisdiction does not result in automatic displacement of state law"). But the jury's general verdict did not specify what, if any, damages were awarded for Jones' pain and suffering.

With regard to the standard of care, unlike the majority of states, Virginia product liability law imposes a "reason to know" standard of care to manufacturers of products. *Compare Owens-Corning Fiberglas Corp. v. Watson*, 413 S.E.2d 630, 635 (Va. 1992) (adopting Restatement (Second) of Torts § 388's chattel *suppliers* "reason to know" standard, rather than § 395's chattel *manufacturers* "should know" standard), *with Restatement (Third) of Torts: Products Liability*, § 2, comment m (2) (1998) ("An overwhelming majority of jurisdictions supports the proposition that a manufacturer has a duty to warn only of risks that were known or *should have been known* to a reasonable person." (emphasis added)).

Maritime product liability law, like that of most states, applies the second and third Restatements' "should know" standard of care. *See*,

e.g., *East River Steamship Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 865-66 (1986) (noting that the Third Circuit adopted the first Restatement standards in *Sieracki v. Seas Shipping Co.*, 149 F.2d 98, 99-100 (3d Cir. 1945), *aff'd on other grounds*, 328 U.S. 85 (1946)); *Gray v. Lockheed Aeronautical Sys. Co.*, 125 F.3d 1371, 1380 (11th Cir. 1997) (relying "on the standard of negligence set forth in the Restatement (Second) of Torts"); *Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co.*, 565 F.2d 1129, 1135 (9th Cir. 1977) (adopting Restatement (Second) standards for product liability); *Daigle v. L&L Marine Trans. Co.*, 322 F. Supp. 2d 717, 728 (E.D. La. 2004) (noting in design defect case that the manufacturer "selected the design and *knew or should have known* of any potential hazard"); *Delta Marine v. Whaley*, 813 F. Supp. 414, 418 (E.D.N.C. 1993) (noting that liability for "failure to give an adequate warning will be imposed for civil admiralty claims only upon a showing that the seller *knew or should have known* of the hazard about which it failed to warn"); *Restatement (Second) of Torts*, § 12, § 395, § 398 (1965).[2] Because there was a direct conflict between these two standards in Virginia, the trial court ruled that maritime law trumped and applied the "should know" standard.

John Crane agrees that this ruling was correct if maritime jurisdiction applied. And because the

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[2] *See also Vickers v. Chiles Drilling Co.*, 822 F.2d 535, 538 (5th Cir. 1987) (relying on the second Restatement and observing that courts from the Third Circuit, Ninth Circuit, and Seventh Circuit have done the same); *Glover v. Johns-Manville Corp.*, 525 F. Supp. 894, 904 (E.D. Va. 1979).

"should know" standard is already the standard in the overwhelming majority of states, this conflict will not be an issue in most cases.

PRINCIPLES OF LAW, ARGUMENT, AND AUTHORITIES

Summary

This Court has directly addressed the issues raised by John Crane's Petition in *Sisson* and in *Grubart*. *See Grubart*, 513 U.S. at 541; *Sisson* v. *Ruby*, 497 U.S. 358 (1990). It need not do so yet again. Cases since *Grubart* demonstrate that Federal and State courts understand that the multifactor tests that predominated prior to *Sisson* are too restrictive and should not be used to determine whether a maritime connection exists. Against this case law, John Crane now claims that the pre-*Sisson* multifactor tests are still valid. Alternatively, John Crane argues that, even if the tests themselves are not valid, the results obtained by such tests are still correct and binding. Finally, John Crane argues that the Virginia Supreme Court and the trial court in this case (collectively the Virginia courts) misunderstood and misapplied the *Sisson* test by improperly defining the type of incident involved and by holding that the activity in this case has a substantial relationship to traditional maritime activity.

The Virginia courts properly confined their analyses to the *Sisson* test, and they applied that test properly. Regarding John Crane's first

contention, the Fifth Circuit, which created the original multifactor test in *Kelly v. Smith*, has stated *en banc* that this "approach was rejected by the Supreme Court in *Grubart*." *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1118 (5th Cir. 1995) (*en banc*). Likewise, the Fourth Circuit, which adopted a virtually identical multifactor test in *Oman v. Johns-Manville*, has abandoned *Oman's* test. Since *Grubart*, no Fourth Circuit case analyzing maritime jurisdiction has so much as mentioned *Oman*. *See, e.g., M/V Drema G. Woods v. Johnson*, 97 Fed. Appx. 449, 450 (4th Cir. 2004); *Brock v. Lewis*, 1996 U.S. App. LEXIS 11871 (4th Cir. 1996); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 154 (4th Cir. 1995); *White v. United States*, 53 F.3d 43, 45 (4th Cir. 1995). Other courts throughout the United States have reached the same conclusion.

Second, application of the pre-*Sisson* multifactor tests does not yield the same results as the *Sisson* test. Though the universe of multifactor results may fit as a subset within the universe of the *Sisson* test's results, multifactor tests have consistently excluded cases that this Court has determined lie within maritime jurisdiction. This is demonstrated by the differing results between this Court's decisions in *Foremost*, *Sisson*, and *Grubart* (employing this Court's test) and the district courts' results in the same cases (employing multifactor tests).

Finally, the Virginia courts properly applied the *Sisson nexus* test by (i) appropriately defining the incident and (ii) focusing on the nature of the activity, not the particular roles or statuses of the

parties. Because there is no error, and because there is no confusion in the Federal and State courts regarding this Court's disapproval of the pre-*Sisson* multifactor tests, this Court should deny John Crane's petition.

I. This Court's General Maritime Jurisdiction Decisions are Clear And Need Not be Revisited Yet Another Time.

A. Background.

For almost two centuries, the "traditional test for admiralty tort jurisdiction asked only whether the tort occurred on navigable waters. If it did, admiralty jurisdiction followed; if it did not, admiralty jurisdiction did not exist." *Grubart,* 513 U.S. at 531-32 (citing *Thomas v. Lane*, 2 Sumn. 1, 23 F. Cas. 957, 960 (No. 13902) (CC Me. 1813) (Story, J., on Circuit)); *Sisson*, 497 U.S. at 360-61; *The Plymouth*, 70 U.S. (3 Wall.) 20, 36 (1866).

Prior to this Court's decision in *Executive Jet*, some federal courts had already begun to push away from the strict locality test. *See, e.g., Chapman v. City of Grosse Pointe Farms*, 385 F.2d 962, 966 (1967) (holding that "jurisdiction may not be based solely on the locality criterion. A relationship must exist between the wrong and some maritime service, navigation or commerce on navigable waters."); *McGuire v. New York*, 192 F. Supp. 866, 871 (S.D.N.Y. 1961) (noting that "[t]his opinion that the finding of some relationship to a vessel be a prerequisite to admiralty jurisdiction is not held solely by the commentators. The cases, with varying

degrees of specificity, have adopted the necessity of a vessel as part of their permanent background" and citing cases).

Thus when it decided *Executive Jet* in 1972, this Court "simply followed the lead of the lower federal courts in rejecting a location rule so rigid as to extend admiralty to a case involving an airplane, not a vessel, engaged in an activity far removed from anything traditionally maritime." *Grubart*, 513 U.S. at 542; *see also Executive Jet Aviation, Inc. v City of Cleveland, Ohio*, 409 U.S. 249, 251-52 (1972).[3] Some commentators and courts, however, thought *Executive Jet* represented a more sweeping departure from this Court's pre-*Executive Jet* jurisdictional calculus than this Court intended. Beginning with the Fifth Circuit in 1973, various courts crafted multifactor tests to help them determine whether a case possessed the requisite maritime connection. *See Kelly v. Smith*, 485 F.2d 520, 525 (5th Cir. 1973); *T. J. Falgout Boats, Inc. v. United States*, 508 F.2d 855, 857 (9th Cir. 1974); *Austin v. Unarco Indus. Inc.*, 705 F.2d 1, 14 (1st Cir. 1983); *Oman v. Johns-Manville Corp.*, 764 F.2d 224,

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[3] Indeed, in approving a *nexus* test, *Executive Jet* acknowledged that the "locality test" "grew up in an era when it was difficult to conceive of a tortious occurrence on navigable waters other than in connection with a waterborne vessel." *Executive Jet*, 409 U.S. at 254. Since then, two sitting Justices of this Court have written that *Executive Jet* should not apply to cases involving waterborne vessels. *See Grubart*, 513 U.S. at 555 (Thomas, J., joined by Scalia, J., concurring); *Sisson*, 497 U.S. at 373 (Scalia, J., joined by White, J., concurring).

226 (4th Cir. 1985).[4] Under these tests, courts engaged in a fact intensive analysis of multiple factors to determine whether the particular facts of the case bore a "significant relationship to traditional maritime activity." *Oman*, 764 F.2d at 227 (citations omitted). The most common factors included "the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and the type of injury; and traditional concepts of the role of admiralty law." *Kelly*, 485 F.2d at 525; *see also Oman*, 764 F.2d at 230 (adopting, verbatim, the *Kelly* factors).[5]

In 1982, this Court addressed maritime jurisdiction again in *Foremost Insurance Co. v. Richardson*, 457 U.S. 668 (1982), to attempt to "resolve the confusion in the lower courts respecting

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[4] John Crane cites the additional cases of *Owens-Illinois v. US Dist. Ct.*, 698 F.2d 967, 971 (9th Cir. 1983), *Lowe v. Ingalls Shipbuilding*, 723 F.2d 1173, 1190 (5th Cir. 1984); *Harville v. Johns-Manville Corp.*, 731 F.2d 775, 787 (11th Cir. 1984), *Woessner v. Johns-Manville Corp.*, 757 F.3d 634, 649 (5th Cir. 1985), and *Myhran v. Johns-Manville Corp.*, 741 F.2d 1119, 1123 (9th Cir. 1984), but these are merely reaffirmations of the same tests.

[5] In adopting this multifactor test, the sharply divided *Oman* court overturned a unanimous panel decision that had found maritime jurisdiction in an asbestos case, like this one, involving shipyard workers on vessels in navigable waters. *See White v. Johns-Manville*, 662 F.2d 234, 239 (4th Cir. 1981). *White* had found that the installation of asbestos materials was "clearly essential to the maritime industry" and that the work done by these shipyard workers "bears a 'significant relationship to traditional maritime activity' because the installation of the asbestos products has a direct effect on maritime navigation and commerce." *Id.*

the impact" of *Executive Jet* "on traditional rules for determining federal admiralty jurisdiction." *Id.* at 669. Though affirming that the Court's *nexus* test extended to "determinations of federal admiralty jurisdiction outside the context of aviation torts," *Foremost,* 457 U.S. at 673, this Court determined maritime jurisdiction was appropriate because the "negligent operation of a vessel on navigable waters" bore a "sufficient nexus to traditional maritime activity," *id.* at 674. The Court was not concerned with particular facts, but the general character of the case — one involving the general activity of vessels in navigation. Multifactor tests like those adopted in *Kelly* and *Oman* were much more restrictive than this Court intended, and they were excluding from maritime jurisdiction cases that this Court and traditional maritime jurisprudence placed firmly in admiralty.

This Court again disapproved multifactor tests in *Sisson* when it held that a fire caused by a washer/dryer unit on a pleasure yacht docked at a recreational marina on a navigable waterway fell within maritime jurisdiction. *See Sisson*, 497 U.S. at 360. On review "the parties and various *amici*" suggested that this Court adopt one of the multifactor tests. *Id.* at 367 n. 4. Rejecting this suggestion, *Sisson* expressly disapproved any "narrow" analysis of traditional maritime activity that was defined by the "actual effects on maritime commerce," "the particular facts of the incident in this case," *id.* at 363, or the "particular circumstances of the incident," *id.* at 364. Instead, this Court emphasized a jurisdictional inquiry involving the case's "general character," *id.* at 363,

the "general features of the type of incident involved," *id.*, and "the general conduct from which the incident arose," *id.* at 364. *Sisson's* careful distinction between an analysis based on the "general" features of a case — rather than its "particular" facts — constituted an implicit rejection of any multifactor test that necessarily requires an in-depth analysis into particular facts to ascertain jurisdiction. On jurisdictional questions, *Sisson* counseled courts to look at the general characteristics of the forest, not the particulars of each individual tree.

This Court resolved any doubt about the continued vitality of multifactor tests in *Grubart*. There, a stationary barge secured to the bed of the Chicago River replaced pilings driven into the bed of the river. The pilings were designed to protect a bridge. Approximately seven months after the completion of this project, a freight tunnel near the old work site collapsed and water from the river flowed into the tunnel and flooded buildings in downtown Chicago. *Grubart*, 513 U.S. at 530. Business owners who suffered damages to their landside premises as a result of the flood brought tort suits under Illinois law. The dredging company, however, sought to limit its liability by invoking maritime law pursuant to 46 U.S.C. §§ 30505 and 30511. The district court held maritime jurisdiction did not apply, but the Seventh Circuit, applying *Sisson*, found maritime jurisdiction and reversed the district court.

This Court granted review and reaffirmed *Sisson's* mandate that courts analyze the general

features of cases — rather than particular facts — when applying the nexus test of general maritime jurisdiction. *See Grubart*, 513 U.S. at 538-41, 548. The *Grubart* petitioners, recognizing "that *Sisson* disapproved the use of four-factor or seven-factor tests," argued that the rule in *Sisson* "implicitly left the matter open for cases like this one, where most of the victims, and one of the tortfeasors, are based on land." *Id.* at 544. This Court declined the offer. If the *Sisson* test is satisfied, the Court responded, more restrictive tests such as the pre-*Sisson* multifactor tests would necessarily be satisfied as well. In other words, if the forest fits, the trees in the forest will fit. But there was no need to adopt a test more restrictive than *Sisson's* to exclude land-based parties from admiralty. *Id.* at 544-45. As long as the *Sisson* test was satisfied, "it is not apparent why the need for admiralty jurisdiction in aid of maritime commerce somehow becomes less acute merely because land-based parties happen to be involved." *Id.* at 545.

B. Federal and State Courts Understand that this Court Rejected the Circuits' Pre-*Sisson* Multifactor Tests.

Courts and the maritime community understand this Court's decisions and have noted the demise of the pre-*Sisson* multifactor tests in the wake of *Grubart*. The Fifth Circuit, the originator of the *Kelly* test, noted its downfall in *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1118 (5th Cir. 1995) (*en banc*). Observing that "this circuit formerly applied a multi-factor approach to determine whether there

was a substantial relationship to traditional maritime activity [citing *Kelly*]," the *en banc* court concluded that this "approach was rejected by the Supreme Court in *Grubart*." *Id.* Thus, the Circuit that originated the test no longer uses it.

The Fourth Circuit, too, has abandoned *Oman*'s multifactor test in the wake of *Sisson* and *Grubart*. Only one Fourth Circuit case since 1990 has cited *Oman's* test. But in that case, the court noted the *Oman* test had been applied too restrictively. *See Price v. Price*, 929 F.2d 131, 133-35 (4th Cir. 1991)(finding maritime jurisdiction where a passenger was injured after losing her balance and falling while disembarking from a motorboat on a reservoir that "is used almost entirely for pleasure boating"). Following *Sisson's* guidance, the court reversed the trial court's determination that there was no maritime jurisdiction. *Id.*

No Fourth Circuit case since *Price* has attempted to employ *Oman's* test. To the contrary, in *White v. United States* the court applied the *Sisson* test and did not mention *Oman* at all. *See White v. United States*, 53 F.3d 43, 46 (4th Cir. 1995); *see also Ryan v. United States*, 304 F. Supp. 2d 678, 682 (D. Md. 2003) (applying the *Sisson* nexus test and citing *White*, but not *Oman*). If *Oman* still controls the maritime jurisdiction analysis in the Fourth Circuit, as John Crane seems to contend, it is hard to conceive a reason why the very court that formulated that analysis *en banc* now ignores it.

The Seventh Circuit chastised the district court in *Grubart* for applying a superceded multifactor test instead of the *Sisson* test.

> The district court, although clearly cognizant of the *Executive Jet, Foremost* and *Sisson* trilogy, used a "totality of the circumstances" test, first articulated by the Fifth Circuit seventeen years before *Sisson* was decided, in assessing the existence of admiralty jurisdiction. *Great Lakes Dredge & Dock Co. v. City of Chicago, 1993 U.S. Dist. LEXIS 16256*, No. 92 C 6754, slip op. at 14, (N.D. Ill. Feb. 18, 1993) (hereinafter Mem. Op. & Ord.) (citing *Kelly v. Smith*, 485 F.2d 520, 525 (5th Cir. 1973)). . . . We believe that, following *Sisson*, the jurisdictional inquiry must be much more rigidly structured than this. . . . A court, therefore, may only ask the three [*Sisson*] questions posed above, which we now consider seriatim.

Great Lakes Dredge & Dock Company v. City Of Chicago, 3 F.3d 225, 228-29 (7th Cir. 1993) (emphasis added).

The Virginia Supreme Court noted the demise of the *Kelly/Oman* multifactor tests in *Mizenko v. Electric Motor & Contracting Co., Inc.*, 419 S.E.2d 637 (Va. 1992). There, a landbased pipefitter was injured when he inhaled solvent fumes during repair on a ship docked at a commercial shipyard. The Virginia Supreme Court noted that this "Court has

uniformly held that ship repair is a maritime activity," and held that this activity had "a significant relationship to traditional maritime activity and that Mizenko has asserted a cause of action in maritime tort." *Id.* at 640. The Virginia Supreme Court relied on *Sisson* and did not mention *Oman* at all.

Five years later, the Virginia Supreme Court found maritime jurisdiction in a case involving a passenger who slipped, fell and was injured onboard the James River ferry. *See Matthews v. Virginia*, 482 S.E.2d 810 (Va. 1997). Noting that "[t]he Supreme Court in *Sisson* expressly declined to adopt the *Kelly* test," the court declined to apply the *Kelly* test, as well. *Id.* at 812. Instead, it applied the controlling law as set forth in *Sisson* and *Grubart*.

Finally, the major admiralty treatises have recognized this Court's rejection of the pre-*Sisson* multifactor tests. Professor Schoenbaum writes that *Grubart* "rejected the application of extraneous four or seven factor tests (as developed in the Fifth Circuit) that would have the effect of narrowing admiralty jurisdiction . . . ." 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 3-5, at 104-05 (4th ed. 2001). *Benedict on Admiralty* notes that in *Grubart* "the Court finally disapproved of the four-part and seven-part tests that had been used by many lower courts." 1 Steven F. Friedell, *Benedict on Admiralty* § 171, at 11-9 (Rel. No. 96, April 2005). Finally, Force and Norris comment that "*Grubart* expressly rejected the Fifth Circuit's multi-factor test or any other of the lower court's tests," and they conclude it "would appear that after *Grubart* it is

inappropriate for counsel to rely on or for a court to use the Fifth Circuit's 'multi-factor' test or any test for nexus other than the criteria approved in *Grubart*." 1 Robert Force & Martin Norris, *The Law of Maritime Personal Injuries* § 1:15, at 1-32 (5th ed. 2004).

Whatever confusion may have existed prior to *Sisson* or in its immediate wake, *Grubart* has made it very clear that *Sisson's* "general features" test — not multifactor tests such as the *Kelly / Oman* test — is the appropriate test to determine whether a case satisfies the nexus component of maritime jurisdiction. In the words of one court, *Grubart* "sounded the death knell for *Kelly v. Smith*." *Arch v. Treasure Chest Casino, L.L.C.*, 306 F. Supp. 2d 640, 645 (E.D. La. 2004).

C. *Foremost*, *Sisson* And *Grubart* Also Demonstrate That The Pre-*Sisson* Multifactor Tests Produce Wrong Results.

John Crane next argues that, even if the pre-*Sisson* multifactor tests have been repudiated, the results of the pre-*Sisson* shipyard asbestos cases are still valid. This Court's experience in *Foremost*, *Sisson* and *Grubart*, however, has consistently demonstrated that the pre-*Sisson* multifactor tests and this Court's *Sisson* test produce different results.

The district courts in *Foremost*, *Sisson* and *Grubart* employed multifactor tests and arrived at results diametrically opposed to the results this

Court found when employing the *Sisson* analysis. In *Foremost*, the district court determined that there was no maritime jurisdiction, *see Richardson v. Foremost Ins. Co.*, 470 F. Supp. 699, 700 (M.D. La. 1979), but on review both the Fifth Circuit and this Court determined that maritime jurisdiction existed, *see Foremost Ins. Co.*, 457 U.S. at 670; *Richardson v. Foremost Ins. Co.*, 641 F.2d 314, 316 (5th Cir. 1981). The district court applied the *Kelly* test; the Fifth Circuit and this Court did not.

Likewise, in *Sisson* the district court concluded the "wrong alleged fail[ed] to bear a substantial relationship to traditional maritime activity" based on a "telescope[d]" two-part inquiry derived from "the four-factor test developed in asbestosis cases . . . ." *In re Complaint of Sisson*, 663 F. Supp. 858, 862, 864 (N.D. Ill. 1987) (relying on *Oman v. Johns-Manville Corp.*, 764 F.2d 224, 230 (4th Cir. 1985), *Woessner v. Johns-Manville Sales Corp.*, 757 F.2d 634, 639-41 (5th Cir. 1985), and *Kelly v. Smith*, 485 F.2d 520, 525 (5th Cir. 1973)). Applying the *Sisson* test, this Court found maritime jurisdiction and reversed.

Finally, in *Grubart*, the district court initially acknowledged this Court's opinion in *Sisson*, but then applied a totality test based on *Kelly* and determined that maritime jurisdiction did not apply. *See Great Lakes Dredge & Dock Company* v. *City Of Chicago*, 1993 U.S. Dist. LEXIS 16256, at *19-31 (N.D. Ill. 1993) (noting that the "Fifth Circuit, in the case of *Kelly v. Smith*, 485 F.2d 520, 525 (5th Cir. 1974), has outlined four factors which may be considered in determining the existence of a

substantial maritime relationship"). On review, however, the Seventh Circuit and this Court found maritime jurisdiction after applying the *Sisson* test.

Thus in all three cases the district courts applied not only the wrong test, but also arrived at the wrong result. Applying a multifactor analysis in a shipyard asbestos case, likewise, yields the wrong results. Accordingly, the results in *Kelly, Oman* and the other shipyard asbestos cases no longer control.

D. *Sisson* And *Grubart* Corrected the Course of Maritime Tort Jurisdiction.

Sisson and *Grubart* counseled courts to focus the nexus inquiry on fringe cases, not core, vessel-related maritime cases. *Executive Jet* was not intended to radically change the bounds of maritime tort law; it was intended to put a limit on cases at the fringes of maritime jurisdiction such as those involving aircraft and swimmers. *See Executive Jet*, 409 U.S. at 254-56.

This is not a fringe case. Maritime tort cases involving both the release of toxic substances on waterborne vessels and the repair and construction of launched vessels have long fallen at the core of maritime tort jurisdiction. *See Just v. Chambers*, 312 U.S. 383, 385 (1941) (stating in a maritime tort case involving carbon monoxide poisoning of a passenger that "[t]here is no question that there was a maritime tort"); *John Baizley Iron Works v. Span*, 281 U.S. 222, 232 (1930) ("Repairing a completed ship lying in navigable waters has direct and

intimate connection with navigation and commerce as has been often pointed out by this Court."); *Messel v. Foundation Co.*, 274 U.S. 427, 433 (1927) ("The [repair] work in which plaintiff was engaged at the time he was injured was maritime in its nature); *Robins Dry Dock & Repair Co. v. Dahl*, 266 U.S. 449, 457 (1925) (noting "[t]he alleged tort was maritime, suffered by one doing repair work on board a completed vessel."); *Great Lakes Dredge & Dock Co. v. Kierejewski*, 261 U.S. 479, 480 (1923) (finding maritime jurisdiction in a wrongful death case involving a boilermaker making repairs "upon a scow moored in the navigable waters of Buffalo River"); *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469 (1922) (finding maritime jurisdiction in a tort case involving a launched vessel under construction, and creating and applying the "maritime but local" doctrine). Each of these cases involved vessel-related injuries of the same character and type involved in this case. And in each case, this Court found the claim fell squarely within maritime jurisdiction.

Sisson and *Grubart* refocused courts on the situs prong for most vessel related torts. The petitioners in *Grubart* complained that "*Sisson* is being given too expansive a reading" and that, under that reading, "virtually 'every activity involving a vessel on navigable waters' would be 'a traditional maritime activity sufficient to invoke maritime jurisdiction.'" *Grubart*, 513 U.S. at 542. This Court, however, did not find this to be "a fatal criticism." *Id.* Noting that it "has not proposed any radical alteration of the traditional [pre-*Executive Jet*] criteria for invoking admiralty jurisdiction in tort

cases," this Court observed it "has simply followed the lead of the lower federal courts [prior to *Executive Jet*] in rejecting a location rule so rigid as to extend admiralty to a case involving an airplane, *not a vessel*, engaged in an activity far removed from anything traditionally maritime." *Id.* (emphasis added).[6] *Grubart* continued, agreeing that though its "cases do not say that every tort involving a vessel on navigable waters falls within the scope of admiralty jurisdiction no matter what, they do show that ordinarily that will be so." *Id.* Concluding, *Grubart* clarified: "Although the existing case law tempers the locality test . . . . it *reflects customary practice in seeing jurisdiction as the norm when the tort originates with a vessel in navigable waters, and in treating departure from the locality principle as the exception.*" *Id.* at 547 (emphasis added). Indeed, two concurring Justices wrote that the *situs* test, alone, should control in vessel-related cases. *See id.* at 555 (Thomas, J., joined by Scalia, J., concurring). Thus this Court corrected the course of maritime jurisdiction by counseling lower courts to return to the *situs* test as the primary, but not sole, consideration in cases involving vessels on navigable waters.

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[6] John Crane apparently misunderstands the context of this statement. Discussing this language from *Grubart*, John Crane concludes that "at the time *Grubart* was decided, the pre-existing jurisprudential framework for applying maritime included the *Oman* result . . . ." *Petition*, at 19. But the cases *Grubart* was actually referring to were the pre-*Executive Jet* cases whose lead *Executive Jet* followed in adopting the nexus requirement; not *Oman* and the other post *Executive Jet* multifactor cases. *See Executive Jet*, 409 U.S. at 255-59 & n.6 (citing pre-*Executive Jet* lower federal court cases advocating a *nexus* prong be added to the strict locality test).

II. The Virginia Supreme Court Did Not Err in Determining that this Case Meets the Requirements for Maritime Jurisdiction.

John Crane finally contends that the Virginia courts misapplied the current maritime jurisdictional analysis. John Crane is wrong. This case falls squarely within maritime jurisdiction under the *Sisson* test. First, this case meets the predominating *situs* requirement because the injury occurred on navigable waters. Second, the case is not excluded from maritime jurisdiction as a fringe case under the *Sisson nexus* test because (1) the "'general features of the type of incident involved,'" in this case had "'a potentially disruptive impact on maritime commerce;'" and (2) the "'general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.'" *Grubart*, 513 U.S. at 534 (quoting *Sisson*, 497 U.S. at 363, 364 n.2, 365). Because John Crane stipulates that this case meets the *situs* requirement, *Petition*, at 20-21, the Respondent will analyze only the nexus requirement.

A. The General Features of the Type of Incident In This Case Had a Potentially Disruptive Impact on Maritime Commerce.

The Virginia courts properly applied the first prong of the *Sisson nexus* test. Under that prong, the "general features of the type of incident involved" must have a "potentially disruptive impact on maritime commerce." *Id.* Under this Court's

guidance, the "*type* of incident" — not the particular incident at issue in the case — controls. *Id.* And the type of incident is to be described "at an intermediate level of possible generality." *Id.* at 538.

John Crane claims the Virginia Supreme Court erred by defining the impact, rather than the incident, at an intermediate level of generality. *See Petition*, at 21. But the opinion's definition of the type of incident refutes this argument. According to *Jones*, the type of incident involved here was "inhalation of asbestos fibers while engaged in the repair and construction of vessels on navigable waters." *Jones*, 650 S.E.2d at 854. This definition clearly is focused, not on the impact of Jones' injury on maritime commerce, but on the type of incident. And it comports with the level of generality exemplified by this Court in *Foremost, Sisson*, and *Grubart*. *Compare Grubart*, 513 U.S. at 539 (defining the incident as "damage by a vessel in navigable water to an underwater structure"); *Sisson*, 497 U.S. at 362 (defining the incident as a "fire that began on a noncommercial vessel at a marina located on a navigable waterway"); *Foremost*, 457 U.S. at 674-75 (defining the incident as a vessel collision on navigable waters).

The next step is to determine whether this type of incident has 'a potentially disruptive impact on maritime commerce.'" *Grubart*, 513 U.S. at 534. This step, likewise, "does not turn on the *actual* effects on maritime commerce," but "whether such an incident is likely to disrupt commercial activity." *Sisson*, 497 U.S. at 363 (emphasis in original). So in *Sisson*, this Court did not consider the fire's actual

impact, but its potential impact on maritime commerce. And this Court concluded that the fire had a potential impact on maritime commerce even though "no commercial vessels happened to be docked at the marina" when the incident occurred. *Id.* Likewise, in *Foremost* this Court did not confine its analysis to the impact on commerce in the noncommercial Amite River where the accident actually occurred, but projected the type of incident into the mouth of the St. Lawrence waterway a busy commercial thoroughfare.

The general type of incident here — the inhalation of asbestos fibers while engaged in the repair and construction of vessels on the navigable waters — not only has a potential impact, but *is* having an enormous impact on maritime commerce. Asbestos is so dangerous that the U.S. Navy and all American commercial ship owners have attempted to remove asbestos products from every vessel afloat; otherwise the vessel may be considered unseaworthy. *See, e.g., Miller v. Am. President Lines, Ltd.*, 989 F.2d 1450, 1464 (6th Cir. 1993) (affirming verdict that ship was unseaworthy due to asbestos); *Vaughn v. Ferrell Lines, Inc.*, 937 F.2d 953 (4th Cir. 1991) (same). The presence and release of asbestos on vessels has forced ship owners to incur remediation costs and the related costs of removing a ship from the stream of commerce to perform the remediation. *See generally U.S. v. Ellis*, 1999 U.S. App. LEXIS 2690 (4th Cir. 1999); *Buck v. ACandS, Inc.*, 154 P.3d 750, 754 (Or. Ct. App. 2007) (noting that "Exxon began an asbestos abatement program in 1972" on its fleet of ships, and it was required to hire "asbestos-abatement specialists [who] would

perform the work"). Ship owners have also face rising Protection and Indemnity (P&I) costs, the potential of having asbestos-related injuries excluded from P&I coverage altogether, and the potential of having a maritime lien asserted against the vessel. *See generally Aasma v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n*, 95 F.3d 400, 402 (6th Cir. 1996); *In re United States Lines*, 169 B.R. 804, 809 (Bankr. D.N.Y. 1994); *In re Prudential Lines*, 148 B.R. 730, 736 (Bankr. D.N.Y. 1992); *Am. S.S. Owners Mut. Prot. & Indem. Ass'n v. Alcoa S.S. Co.*, 232 F.R.D. 191, 192 (D.N.Y. 2005); 46 U.S.C. § 31301 (5)(B).

The economic impact arising just from the claims of the people who have been disabled or killed by exposure to asbestos-containing products is staggering. This Court has noted:

> On the basis of past and current filing data, and because of a latency period that may last as long as 40 years for some asbestos related diseases, a continuing stream of claims can be expected. The final toll of asbestos related injuries is unknown. Predictions have been made of 200,000 asbestos disease deaths before the year 2000 and as many as 265,000 by the year 2015.

Ortiz v. Fibreboard Corp., 527 U.S. 815, 822 (1999). The portion of this "stream of claims" that arises from exposure on board ships has already had an enormous impact through claims under the Longshore and Harborworkers' Compensation Act,

see, e.g., New Orleans Stevedores v. Ibos, 317 F.3d 480, 482 (5th Cir. 2003); *Newport News Shipbuilding & Dry Dock Co. v. Stilley*, 243 F.3d 179 (4th Cir. 2001), the Jones Act, *see, e.g., Marine Asbestos Cases v. Am. Hawaiian Cruises, Inc.*, 265 F.3d 861 (9th Cir. 2001) (consolidated case involving 174 cases under the Jones Act, 46 U.S.C. § 688 *et seq.*); *Miller v. American Heavy Lift Shipping*, 231 F.3d 242 (6th Cir. 2000), and under general maritime law, *see, e.g., Dicola v. Am. S.S. Owners Mut. Prot. & Indem. Assoc.*, 158 F.3d 65, 68 (2d Cir. 1998) (noting that "approximately 5,000 Claimants have alleged that they suffered asbestos-related bodily injuries by exposure to asbestos while working aboard Prudential's ships," and seek damages, *inter alia*, under general maritime law). All of this has had a tremendous actual impact on maritime commerce.[7]

In addition to the actual impact, "[u]nsafe working conditions aboard a vessel have consistently been held to pose a potentially disruptive impact upon maritime commerce." *Lambert v. Babcock & Wilcox, Co.*, 70 F.Supp.2d 877, 884 (S.D. Ind. 1999); *see also Weaver v. Hollywood Casino-Aurora, Inc.*, 255 F.3d 379, 386 (7th Cir. 2001) (stating that "without doubt an injury to . . . crew [of a "commercial boat"] disrupts its participation in

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[7] Compare this large scale impact on commerce with the minor potential impact on commerce arising from the incidents in *Sisson*, *Foremost*, and even *Kelly v. Smith*. A fire affecting a limited number of vessels in a marina, a two ship collision even in a busy water way, or a land-based person firing a weapon at a motorboat on a commercial waterway have a comparatively miniscule and short-lived potential impact on maritime commerce.

maritime commerce."); *Alderman v. Pacific Northern Victor, Inc.*, 95 F.3d 1061, 1064 (11th Cir. 1996) ("Unsafe working conditions aboard a vessel under repairs, maintenance, or conversion, therefore, pose a potentially disruptive impact upon maritime commerce."); *Coats,* 61 F.3d at 1119 (noting that "worker injuries, particularly to those involved in repair and maintenance, can have a disruptive impact on maritime commerce by stalling or delaying the primary activity of the vessel"); *Bartel v. A-C Product Liability Trust*, 461 F. Supp. 2d 600, 602 (N.D. Ohio 2006) (finding a seaman's asbestos-related disease claim was governed by maritime law).

Based on this actual and potential impact, the Virginia courts rightly decided that this case meets *Sisson's* first nexus prong.

B. The General Character of the Activity Giving Rise to the Incident Shows a Substantial Relationship to Traditional Maritime Activity.

This case also meets the second prong of the nexus test. The second prong requires the court to "determine whether 'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.'" *Grubart*, 513 U.S. at 534.

John Crane attempts to focus this prong solely on its own negligence and to divorce that negligence — which it narrowly characterizes as the "failure to warn of the use of asbestos fibers in its products that

were placed into the stream of commerce for use by the Decedent," *Petition* at 25 — from anything maritime. Assuming, without conceding, this is the correct characterization of the activity in this case, the limitation of John Crane's activity to land-based behavior is fundamentally wrong for at least two reasons.

First, John Crane's argument assumes its negligence stopped when its products were put into the stream of commerce. But "the fact that the defective product was manufactured on land or the wrongful act occurred on land is of no significance" in a maritime action. 1 Thomas J. Schoenbaum, ADMIRALTY AND MARITIME LAW § 3-11, at 143 (4th ed. 2004). Admiralty courts have long held that a wrongful act is not actionable negligence until it is consummated, or takes effect, upon a victim. *See, e.g., The Plymouth*, 70 U.S. at 36; *Sperry Rand Corp. v. Radio Corp. of America*, 618 F.2d 319, 321 (5th Cir. 1980). If a wrongful act does not actually injure someone, it "furnishes no cause of action; it is *damnum absque injuria.*" *The Plymouth*, 70 U.S. at 36.

John Crane's negligent failure to warn was not limited to a discrete point of manufacture in a land-based factory; it continued through to Jones' unwarned use of these products in the engine rooms of ships on navigable waters. *See, e.g., Smith v. Pan Air Corp.*, 684 F.2d 1102, 1107, 1111 (5th Cir. 1980) ("In products liability cases . . . the place where the negligence or wrongful act occurs is not decisive. The place injury occurs . . . [is] more significant."); *Jig The Third Corp. v. Puritan Marine Ins.*

Underwriters Corp., 519 F.2d 171, 174 (5th Cir. 1975) (holding maritime jurisdiction applied "even though the conduct complained of may have been negligent construction or defective design and may have occurred ashore"); *Sears, Roebuck & Co. v. Am. Pres. Lines, Ltd.*, 345 F. Supp. 395, 402 (N.D. Cal. 1971) ("Admiralty jurisdiction is proper even though the negligent act occurs on land" if the "damage was inflicted at a point within admiralty jurisdiction.").

John Crane stipulates its negligence was consummated on a vessel in navigable waters. *See Petition*, at 20 (stipulating exposure on a vessel on navigable waters under the *situs* prong). That is where John Crane's wrongful act became actionable negligence. To be sure, it was only at that point that John Crane became a putative tortfeasor.

Second, John Crane's behavior gave rise to the quintessential maritime product liability action. *See East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 864 (1986) (recognizing product liability in general maritime law); *Jig The Third Corp.*, 519 F.2d at 173 (affirming verdict for negligent design of "4 1/2-inch, cold-rolled steel shaft"); *Watz v. Zapata Off-Shore Co.*, 431 F.2d 100, 115 (5th Cir. 1970) (holding that a land-based shipbuilder had a claim for negligent design and testing of a chain); *Schaeffer v. Michigan-Ohio Navigation Co.*, 416 F.2d 217, 218 (6th Cir. 1969) (recognizing a claim against Westinghouse for negligence, negligent failure to warn, and breach of an implied warranty regarding a dumbwaiter installed on a ship). Following the rule John Crane proposes would eviscerate maritime product liability actions because it would restrict

courts' analyses to a single land-side point in time in the manufacturing process. Such a focus would ensure that virtually no product liability action could ever be filed in admiralty. It would flatly eliminate maritime jurisdiction over all vessel-related torts if the product was manufactured in a land-based factory (as most are). Thus, John Crane's rule would turn the *Sisson* test "on its head, from a test to weed out torts without a maritime connection into an arbitrary exercise of eliminating jurisdiction over even vessel related torts connected to traditional maritime commerce." *Grubart*, 513 U.S. at 542 & n.4.[8]

In the Virginia courts, John Crane attempted to avoid this result by arguing there was a limited exception for products that were manufactured

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[8] John Crane's argument would even eliminate product liability claims by seamen. *See generally Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488, 491 (6th Cir. 2005); *Bartel v. A-C Prod. Liab. Trust*, 461 F. Supp. 2d 600, 602 (N.D. Ohio 2006); *Lambert v. Babcock & Wilcox, Co.*, 70 F. Supp. 2d 877, 880 (S.D. Ind. 1999); *Tritt v. Atlantic Richfield Co.*, 709 F. Supp. 630, 631-32 (E.D. Pa. 1989). John Crane may argue that these cases are different because they involved seamen, not land-based shipyard workers, but this would be a flawed distinction. "Seaman" status is pertinent for certain remedies such as maintenance and cure, unseaworthiness, or Jones Act negligence. But product liability is a general maritime remedy that has never required a finding of seaman status. And uniformity being one of the weighty interests of maritime law, there is no principled reason to treat workers differently when they are exposed to the same negligence in the same maritime *situs*, and develop the same injuries. *See, e.g., Moragne v. States Marine Lines*, 398 U.S. 375, 402 (1970) (noting that "federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country'").

specifically for maritime use, but it contended its products did not qualify for this exception. *See Petition*, at 100a (John Crane's Memorandum in the trial court arguing "[a]n exception to this rule can be carved out for products made and intended for use specifically in a maritime setting"). To refute this new argument, Plaintiff proffered evidence demonstrating John Crane directly targeted the maritime industry. It characterized and advertised the gasket and packing materials Jones used as "Marine" sealing materials. These products were designed, marketed and sold "directly for the marine industry," and specified for "marine engines and general ship use." John Crane actively solicited approval of its products for Navy service. It advertised its products in marine engineering journals and it boasted of having a "marine liaison engineer" who "work[ed] with naval architects, port engineers, ship engineers and manufacturers of marine equipment." *See generally Petition*, at 63a – 88a (Exhibits attached to Plaintiff's Opposition to John Crane Inc.'s Motion to Apply Virginia Law).

John Crane now seems to disavow this argument and even goes so far as to blame the Virginia courts for analyzing the very issue John Crane raised. *See Petition*, at 26-28. One reading John Crane's Petition in isolation would conclude that the Plaintiff raised this issue and that she misled the Virginia courts into deciding the jurisdictional issue solely on the basis of this "limited exception" argument. This is not true.

The Plaintiff and the Virginia courts were merely responding to a new argument John Crane

made against the backdrop of the Virginia Supreme Court's previous jurisdictional analyses in *Mizenko*, *Matthews*, and *Little*. In fact, the Virginia Supreme Court's opinion in this case first analyzed the two prongs of the *Sisson* test and reaffirmed its prior ruling in *Little*. *See Jones*, 274 Va. at 589. Only then did the Virginia Supreme Court address John Crane's new "limited exception" argument.

John Crane's "limited exception" argument — that "there is nothing particularly maritime about the use of asbestos fibers in fabricating gaskets and packing" — is merely a re-tooling of *Oman's* interpretation of the first *Kelly* factor. *See Petition*, at 25-28; *Oman*, 764 F.2d at 230-31 (noting that the defendant's role and function favored maritime jurisdiction because the defendant provided *marine-specific products*, but the plaintiffs' roles and functions did not favor maritime jurisdiction because their actions were "not unique to maritime service"). But, again, this sort of particularized analysis was rejected by this Court in *Foremost, Sisson*, and *Grubart*.

The subsidiary notion that the plaintiff's or defendant's role must be "unique to maritime service" fails as well. Maintaining a washer/dryer unit, *Sisson*, 497 U.S. at 363, pounding pilings into the ground, *Grubart*, 513 U.S. at 539, negligently designing a "4 1/2-inch, cold-rolled steel shaft," *Jig The Third Corp.*, 519 F.2d at 173, or a chain, *Watz*, 431 F.2d at 115, or a dumbwaiter system, *Schaeffer*, 416 F.2d at 218, or, for that matter, guarding against a trip and fall hazard, *White*, 53 F.3d at 47; *Matthews*, 482 S.E.2d at 812, are not "uniquely

maritime" either. Indeed, each of these activities occur more frequently outside a maritime environment. But each arose under maritime jurisdiction because of their general connection to a maritime activity and their occurrence on a vessel on navigable waters. Thus, John Crane's argument that this case does not fit under maritime jurisdiction due to the particular nature of its products or its own function is a reversion to the pre-*Sisson* multifactor tests disapproved by this Court on three previous occasions.

Finally, to the extent John Crane claims that asbestos diseases do not qualify for maritime jurisdiction because of the long latency period between exposure and death, *see Petition*, at 22-23, this Court rejected this argument in *Grubart*, 513 U.S. at 536. There, the petitioners argued that "the damage must be close in time and space to the activity that caused it: that it must occur 'reasonably contemporaneously' with the negligent conduct and no 'farther from navigable waters than the reach of the vessel, its appurtenances and cargo.'" *Id.* at 536. The "demerits of this argument," this Court responded, lay in its "want of textual support for its nonremoteness rule," and in its disregard of the Act's use of "the phrase 'caused by . . . .'" *Id.* Citing *Palsgraph v. Long Island R. Co.*, 162 N.E. 99 (NY 1928), this Court observed that the "classic tort notion" of proximate cause "eliminates the bizarre" and "its use should obviate not only the complication but even the need for further temporal or spatial limitations." *Id.* So, *Grubart* held, there "is no need or justification, then, for imposing an

additional nonremoteness hurdle in the name of jurisdiction." *Id.* at 538.

The jury in this case necessarily found that John Crane's actions proximately caused Jones' injury and death. John Crane did not appeal this finding. So, because it is an established fact — by virtue of the jury's unappealed determination as to proximate causation — that Jones' injury was proximately caused by his exposure to the asbestos-containing products on the vessels he worked on, maritime jurisdiction applies.[9]

CONCLUSION

This Court has made abundantly clear the appropriate test for general maritime tort jurisdiction. State and Federal courts understand the current jurisprudence and do not need another clarification. Based on this Court's clear guidance, the Virginia courts applied the appropriate test and applied it correctly. Accordingly this Court should deny John Crane's Petition.

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[9] Moreover, this latency argument has had no effect on the jurisdictional calculus of asbestos cases brought by seamen under general maritime law even though those cases involved similar latency periods. *See generally Lindstrom*, 424 F.3d at 491; *Bartel*, 461 F. Supp. 2d at 602; *Lambert*, 70 F. Supp. 2d at 880; *Tritt*, 709 F. Supp. at 631-32.

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In The
Supreme Court of the United States

JOHN CRANE INC.,

Petitioner,

v.

WANDA T. JONES,
ADMINISTRATRIX OF THE ESTATE OF
GARLAND F. JONES, JR., DECEASED,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

REPLY BRIEF OF PETITIONER

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INTRODUCTION

John Crane hereby responds to the new matters in Respondent's Brief in Opposition pursuant to Rule 16.6 of the Rules of the Supreme Court of the United States. First, contrary to Respondent's claim, John Crane does not advocate any alteration of the Sisson or Grubart tests, but rather argues that those cases should be applied properly to this matter. (See Brief in Opposition, 33). In fact, Respondent conspicuously fails to respond to John Crane's reasoned arguments that there is no justification for the application of a uniform maritime standard or a need for a court with expertise in admiralty to decide garden variety tort cases such as the one at bar. This can only be considered a tacit acknowledgement by Respondent that the "primary focus" of maritime law -- to protect maritime commerce[1] -- is not promoted by expanding its jurisdiction to shipyard asbestos cases, as John Crane argues more fully below.

Second, the application of maritime jurisdiction to shipyard asbestos claims would have a dramatic effect on how such cases are litigated in many jurisdictions. Third, the principles announced by this Court in Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995) (hereinafter Grubart) and its predecessors, Sisson v. Ruby, 497 U.S. 358 (1990), Foremost Insurance Co. v. Richardson, 457 U.S. 668 (1982), and Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972), are clear and should not be changed in

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[1] Foremost, 457 U.S. at 674.

products liability cases, as Respondent seems to advocate. Finally, the Supreme Court of Virginia placed far too much emphasis on the particular facts of this case, instead of evaluating the general character of the activity giving rise to the injury, as required by Grubart. To the extent Respondent advocates that the Supreme Court of Virginia's misguided analysis was an appropriate application of this Court's established principles of maritime jurisdiction, she is mistaken.

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITIES

I. John Crane Does Not Advocate Any Modification to this Court's Well-Established Jurisdictional Analysis.

Contrary to Respondent's implication, John Crane does not suggest that this Court abandon or modify its clear precedent established in Sisson and Grubart. To cite just one example of Respondent's mischaracterization of John Crane's arguments, John Crane does not believe that "the plaintiff's or defendant's role must be 'unique to maritime service.'" (See Brief in Opposition, 33). John Crane merely asks this Court to rule consistently with its opinions in Grubart and its predecessors. Respondent cannot show that the tortfeasor's activity was sufficiently related to traditional maritime activity such that the reasons for applying admiralty's special rules would apply here. See Grubart, 513 U.S. at 539.

Indeed, Respondent does not even attempt to argue that this garden-variety product liability case would benefit from the application of special admiralty rules—rules devised to protect maritime commerce through regulation of the peculiar activity of vessels on navigable waters. Nor is it ever made clear why uniformity of decision would be desirable in asbestos product liability cases where the plaintiffs simply inhaled fibers while working on navigable waters. By failing to address either of these concerns, Respondent passively acknowledges the weakness of her position.

Maritime jurisdiction can only be appropriate where the justification for special rules is apparent. Evaluation of the manufacture and sale of asbestos products does not require any special expertise on the fact-finder's part, and it does not demand the exercise of uniform common-law rules designed to apply to vessels on navigable waters. Along with the hundreds of thousands of other asbestos tort claims, this case should be decided consistently with well-established state tort law. See Grubart, 513 U.S. at 543 (acknowledging that "States have a strong interest in applying their own tort law").

Finally, a ruling in John Crane's favor would not "flatly eliminate maritime jurisdiction over all vessel-related torts if the product was manufactured in a land-based factory". (Brief in Opposition, 33). This argument begs the question because it assumes that John Crane's activity was vessel related. Peering through the lens of the Grubart generality principle (see § IV, infra) reveals that John Crane's activity is not "vessel-related," so a decision in John

Crane's favor would return maritime law to its well-charted course.

II. The Disposition of this Appeal Has the Potential to Affect a Multitude of Cases in Lower Courts.

The concerns raised in this appeal are not trivial. This Court's decision herein will affect many cases across the country, despite Respondent's implication to the contrary.[2] (Brief in Opposition, 4-7). Mr. Jones' exposure history is hardly unique. Indeed, Respondent's counsel in this case is currently pursuing dozens of active shipyard asbestos cases against John Crane alone. One other such case, John Crane Inc. v. Oney, Supreme Court of Virginia No. 071861, has a very similar fact pattern to that in Jones and will be appealed to this Court on the same issue in the coming weeks.

The differences between maritime and Virginia tort law number far more than those described in John Crane's Petition; some were excluded for the sake of brevity, others because they were not important to this particular case. To cite a few more differences, maritime law follows a comparative fault approach to liability with allocation of fault among joint wrongdoers, McDermott, Inc. v. AmClyde, 511 U.S. 202, 207

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[2] This belief is particularly incongruous with Respondent's argument that a decision in John Crane's favor would "eviscerate maritime product liability actions". (Brief in Opposition, 30; see also § I, supra). Thus, by any reasonable standards, the implications of this case are sufficiently weighty to demand close scrutiny.

(1994), while contributory negligence by the plaintiff is a complete bar to recovery in Virginia. Estate of Moses v. Southwestern Va. Transit Mngmnt. Co., 273 Va. 672, 678, 643 S.E.2d 156, 159-60 (2007). Plaintiffs in admiralty courts can recover under a strict liability standard, East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 865 (1986); plaintiffs in Virginia courts cannot. Sensenbrenner v. Rust, Orling & Neale, Architects, 236 Va. 419, 424 n.4, 374 S.E.2d 55, 57 (1988). Virginia observes a statutory cap of $350,000 on punitive damages. § 8.01-38.1, Code of Virginia, 1950, as amended. General maritime law, if it provides for punitive damages, has no cap.

Any state whose laws differ from maritime rules in any one of the foregoing respects will be affected by the outcome of this appeal. Shipyard asbestos litigation is extremely active in a multitude of American jurisdictions. Accordingly, this case presents this Court with an opportunity to establish a far-reaching and highly relevant precedent in the application of maritime jurisdiction.

III. The Nexus Test is a Crucial Part of the Maritime Jurisdictional Analysis and There is No Support for the Marginalization that Respondent Apparently Advocates.

Though she admits that "the universe of multifactor results may fit as a subset within the universe of the Sisson test's results" (Brief in Opposition, 8), Respondent attempts to marginalize any case turning on Sisson's nexus test as an

obscure "fringe case" and essentially urges this Court to ignore the test in product liability cases. (Brief in Opposition, 20). These arguments, and the Virginia Supreme Court's ruling, are untenable upon a close reading of Grubart and Sisson.

The requirements of the second nexus prong are not on the "fringe". They are not a mere exception but comprise an important piece of the jurisdictional puzzle. That the activity giving rise to the incident causing injury be substantially related to traditional maritime activity is closely tied to the unquestionable focus of admiralty jurisdiction: the protection of maritime commerce. See Foremost, 457 U.S. at 674-75. As John Crane argued in its Petition, this purpose is only satisfied when maritime law is applied to wrongdoers participating in traditional maritime activity. Thus an operator of a pleasure boat is subject to maritime law because he operated a vessel on navigable waters. Foremost, 457 U.S. at 669. A tortfeasor enjoys the protections of maritime limitation of liability because he stored

and maintained a vessel on navigable waters.[3] Sisson, 497 U.S. at 365. A crane operator is subject to maritime law because it was engaged in "repair or maintenance work on a navigable waterway performed from a vessel." Grubart, 513 U.S. at 540 (emphasis added). John Crane's activity, on the other hand, was not vessel-related or on navigable waters. Placing asbestos products into the stream of commerce does not necessarily implicate a vessel on navigable waters, and asbestos fibers have been used in myriad applications unrelated to maritime activity.

Respondent's distaste for the nexus test is apparent in her mistaken belief that Grubart and Sisson declined to adopt a multifactor "substantial relationship" test because this Court found such tests too restrictive. (Brief in Opposition, 12). Nothing in either decision suggests that this Court disapproved the multifactor tests because the results

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[3] Respondent's suggestion that the maintenance of a washer/dryer unit created maritime jurisdiction in Sisson reveals her fundamental misunderstanding of the importance of generality to this inquiry. (Brief in Opposition, 33). In Sisson, this Court held that the relevant activity was "the storage and maintenance of a vessel at a marina on navigable waters." Sisson, 497 U.S. at 365. Respondent's ultra-specific focus on the storage and maintenance of the washer/dryer is not only inconsistent with this Court's plain language; it is exactly the type of "particularized analysis" that she pretends to eschew. (Brief in Opposition, 33). More germane to John Crane's activities as a manufacturer, this Court has since acknowledged that the actions of the washer/dryer manufacturer in Sisson were "hardly maritime," strongly implying that the manufacturer would not have been subject to maritime law if it were hailed into court alone. Grubart, 513 U.S. at 541.

produced by those tests were overly restrictive. On the contrary, "the Sisson tests are aimed at the same objectives invoked to support a new multifactor test, the elimination of admiralty jurisdiction where the rationale for the jurisdiction does not support it." Grubart, 513 U.S. at 544-45. This Court simply found that fine-tuning its rule, as the petitioners in Grubart and Sisson asked it to do, was unnecessary because the Sisson test assumed that satisfaction of its factors implicated a finding of federal interest in the protection of maritime commerce. See id., Sisson, 497 U.S. at 364 n.2. In other words, the concern was not with faulty results, but practicality. The notion that the multifactor tests are somehow inherently "more restrictive" than the Sisson factors seems to have been fabricated from whole cloth.[4]

Furthermore, the "substantial relationship" prong should not be treated as a redundant second "locality" test in products liability cases, as Respondent believes. (Brief in Opposition, 29). Though two members of this Court have advocated the restoration of the strict "locality" test, the

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[4] In Grubart, the petitioners asked this Court to add to the second nexus prong a "totality of the circumstances" test to be applied only in cases "involving land based parties and injuries". Grubart, 513 U.S. at 543. Hence this Court's discussion of "land-based parties". Id. at 545. The multifactor tests were designed only to interpret the second nexus prong. John Crane does not ask this Court to change its rule and does not deny maritime jurisdiction simply because it is "land-based". It denies maritime jurisdiction because the inhalation of asbestos fibers does not threaten maritime commerce and because John Crane's actions bore no relation to traditional maritime concerns.

"substantial relationship" analysis set forth in Sisson and Grubart clearly requires evaluation of the tortfeasor's activity alone, without regard to where the injury took place. It would make little sense to observe a "substantial relationship" prong if it were simply a restatement of the "locality" test. This Court does not ask "where the tort occurred" for the purposes of this prong, but rather looks to the general character of the tortfeasor's activity giving rise to the incident. Grubart, 513 U.S. at 534. None of John Crane's activity which gave rise to Mr. Jones' injury was maritime, regardless of where the injury was incurred.[5] Finally, none of the pre-Executive Jet cases cited by Respondent, decided under the locality rule and before the introduction of the "substantial relationship test," is of any use to this Court.

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[5] Compare John Crane's activity to that of the defendants in Respondent's most favored appellate case, Jig the Third Corp. v. Puritan Marine Ins. Underwriters Corp., 519 F.2d 171 (5th Cir. 1975), where the defendant actually designed and built the entire vessel, not just the defective 4-inch shaft as Respondent implies. In any event, Jig the Third is of no precedential value because it was decided prior to Foremost and Sisson, which were both aimed at keeping certain cases out of admiralty. Grubart, 513 U.S. at 364. Likewise, the defendant in East River, a pre-Sisson case, designed, built, and even supervised the installation of massive turbines for use aboard specific ships. East River, 476 U.S. at 859. Unlike in this case, the defendants' activities in Jig the Third and East River directly involved vessels. Their products could only have been used in a maritime context; they had no other conceivable use.

IV. The Supreme Court of Virginia's "Substantial Relationship" Analysis Was Improperly Focused on Facts Extraneous to the Grubart and Sisson Test.

In its analysis of the "substantial relationship" prong, the Supreme Court of Virginia cited two reasons for its finding that John Crane's activity was substantially related to traditional maritime activities. John Crane Inc. v. Jones, __ Va. __, 650 S.E.2d 851, 854-55 (2007) (hereinafter Jones). The first was a reliance on its previous opinion in Garlock Sealing Technologies, LLC v. Little, 270 Va. 381, 384-86, 620 S.E.2d 773, 775-77 (hereinafter Little). John Crane has already shown how the Little court improperly focused its inquiry on the activity of the plaintiff and defined the relevant activity as "ship repair," rather than examining the activity of the defendant. (Petition, 24 n.9); see also Grubart, 513 U.S. at 539-40 (describing the relevant inquiry as "whether a tortfeasor's activity...on navigable waters is so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the suit at hand") (emphasis added). To be sure, neither Garlock nor John Crane was engaged in "ship repair," and there is no reason to apply special maritime rules to this garden variety product liability tort.

The Supreme Court of Virginia's second consideration in its analysis of the "substantial relationship" prong was an extremely case-specific recitation of facts. Jones, 650 S.E.2d at 855. Even

though it correctly defined the relevant activity in general terms as "the manufacture and sale of asbestos-containing products into the stream of commerce,"[6] the Supreme Court of Virginia went from this general characterization to a highly particularized discussion of the content and location of John Crane's advertisements. Jones, 650 S.E.2d at 854-55. According to the court, John Crane's advertising activity "bore a substantial relationship to traditional maritime activities." Id. at 855. But under Grubart, the general character of John Crane's activity giving rise to the incident should have been tested for a substantial relationship, not the specific features of John Crane's advertisements. Grubart, 513 U.S. at 534, 539-40. As John Crane argued in its Petition, its advertisements were not a proximate cause of Mr. Jones' injury, and it was improper for the court to assume in a jurisdictional analysis that they were. (Petition at 27).

Furthermore, the court failed to show how John Crane's activity justified the application of maritime's special rules. There was no discussion of how generally placing asbestos-containing products in the stream of commerce is activity "on navigable waters" or substantially related to maritime pursuits. See Grubart, 513 U.S. at 539-40. Nor is

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[6] John Crane proposed a slightly different definition of the relevant activity in its Petition: "failure to warn of the use of asbestos fibers in its products that were placed into the stream of commerce". (Petition, 25). Either definition is an acceptable description of the activity giving rise to Mr. Jones' inhalation of asbestos fibers. John Crane disagrees only with the Supreme Court of Virginia's application of that definition, as stated infra.

there any explanation of how placing asbestos-containing products into the stream of commerce is so closely related to admiralty law that the reasons for applying special admiralty rules would apply. Respondent's and the Supreme Court of Virginia's reasoning is in clear conflict with Grubart's emphasis on the general over the specific, and completely ignores the lack of justification for the uniform application of special admiralty rules to the general aspects of John Crane's activity in this case.

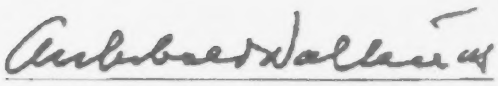
Despite Respondent's efforts to downplay the importance that the Supreme Court of Virginia placed on John Crane's advertising to the maritime industry (Brief in Opposition, 32-33), the court did indeed hold that the advertisements alone satisfied the "substantial relationship" test. Jones, 650 S.E.2d at 855. John Crane did not raise any "limited exception" argument to provoke this overly fact-specific analysis. (See Appellant's Brief to Supreme Court of Virginia, 2a-17a). Respondent's suggestion that the Supreme Court of Virginia would dedicate the entirety of its analysis of an important prong of jurisdictional analysis to "rebut" a theory that was not even submitted to that court is wildly fanciful. Without prompting, the court departed from a proper analysis of the general character of the activity for a narrow analysis of case-specific facts, and used those facts to fashion its decision. In supporting this logic, Respondent further indicates that she does not reject a "particularized analysis," but only professes to do so when it suits her.

CONCLUSION

For the foregoing reasons, and for those stated in its Petition for Writ of Certiorari, John Crane respectfully renews its request that this Court grant its Petition.

JOHN CRANE INC.

By Counsel



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APPENDIX

IN THE

Supreme Court of Virginia

RECORD NO. 062164

JOHN CRANE INC.,

Appellant,

v.

WANDA T. JONES,
ADMINISTRATRIX OF THE ESTATE OF
GARLAND F. JONES, JR., DECEASED

Appellee.

BRIEF OF APPELLANT

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* * *

IV. THE TRIAL COURT ERRED IN APPLYING GENERAL MARITIME LAW RATHER THAN VIRGINIA LAW.

The trial court committed reversible error in applying federal maritime law. At the February 10, 2006 pretrial conference, John Crane advocated for the application of Virginia law; Plaintiff argued maritime law should apply. (App. pp. 1344-51) The thrust of John Crane's argument was that the trial court must focus on the "activity" or the "wrong" allegedly committed by the tortfeasor in determining whether to apply maritime law, and that John Crane's actions had no connection to maritime activities. (App. pp. 131-38, 1345-46) Plaintiff contended that the trial court's decision hinged on the location of Mr. Jones' harm - the shipyard and the interior of the U.S.S. America. (App. pp. 191-201) The trial court sided with Plaintiff, basing its decision on this Court's decision in Little. (App. p. 1351)

John Crane respectfully requests that this Court re-assess the statements in Little concerning the application of maritime law to cases such as this, because Little misinterpreted the United States Supreme Court's holding in Sisson v. Ruby, 497 U.S. 358, 362 (1990). In Sisson, the Supreme Court held that maritime jurisdiction is dependent upon (1) the incident's potential to disrupt maritime commerce, and (2) the activity from which the incident arose and whether that activity bore a significant relationship to traditional maritime activity. Id. at

365-67. In Little, while examining the "incident's" connection with traditional maritime activity, the Court misidentified the relevant "activity" as "ship repair" — the activity plaintiff was engaged in - rather than focusing on "activity" or conduct of the tortfeasor. Following that rationale, the trial court's application of maritime law to this case was improper because John Crane's "activity" - the manufacture of an allegedly defective product, and the failure to warn users of its dangerous properties - bears no relation to traditional maritime activity. The error was prejudicial, because the jury was instructed on the "knew or should have known" duty of care provided by maritime law instead of the proper "knew or had reason to know" standard in Virginia. This Court reviews questions of law de novo, including those situations where there is a mixed question of law and fact. Westgate at Williamsburg Condo. Ass'n v. Philip Richardson Co., 270 Va. 566, 574, 621 S.E.2d 114, 118 (2005).

A. The Sisson Test Narrowed The Application Of Admiralty Jurisdiction And General Maritime Law To Tort Cases.

In Executive Jet Aviation. Inc. v. City of Ohio.,409 U.S. 249, 93 S. Ct. 493 (1972), the Supreme Court adopted a two-prong test for determining whether admiralty law applied to a plane crash in the waters of Lake Erie: (1) the *situs* of the crash had to be within navigable waters; and (2) there had to be some *nexus* between the type of activity involved and traditional maritime activity. Id. at 253-255. A trilogy of subsequent opinions

expanded upon these requirements: Foremost Ins. Co. v. Richardson, 457 U.S. 668, 102 S. Ct. 2654 (1982); Sisson v. Ruby, 497 U.S. 358, 110 S. Ct. 2892 (1990); and Grubart v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 115 S. Ct. 1043 (1995).

After Foremost, Sisson and Grubart, the threshold "locality" prong remained the same, asking "whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water." Grubart, 513 U.S. at 534. However, the "maritime connection" or "nexus" prong was expanded to require a court to determine if (1) the "incident" has "a potentially disruptive impact on maritime commerce," Sisson, 497 U.S. at 363, and (2) whether the "activity" giving rise to the incident had "a substantial relationship to traditional maritime activity." Id. at 364; Grubart, 513 U.S. at 534. This analysis is generally referred to as "the Sisson test." Applying the Sisson test to the facts of this case reveals that there was no maritime connection.

1. The Trial Court Correctly Found The "Locality" Prong of the Sisson Test Satisfied.

The parties agree that Mr. Jones' asbestos injury occurred at the Newport News Shipyard on the James River for purposes of determining the choice of law. The Plymouth, 70 U.S. (3 Wall) 20, 34-35 (1866); East River Steamship Corp. v. TransAmerica, 476 U.S. 858, 863-864 106 S. Ct. 2295, 2299 (1986). The federal courts have found the locality prong satisfied in cases where shipyard

workers were exposed to asbestos fibers while building or repairing vessels partially on land, and partially at sea. See, e.g., Harville v. Johns-Manville Products Corp., 731 F.2d 775, 782 (11th Cir. 1984) (finding the locality test is met when only some of the asbestos exposure occurred in a maritime situs); Owens-Illinois, Inc. v. United States District Court, 698 F.2d 967, 969 (9th Cir. 1983) (locality test met where shipyard worker was exposed to asbestos on land and in the harbor). Mr. Jones was exposed to asbestos fibers while working aboard an incomplete, but launched, vessel. Accordingly, the locality prong was satisfied.

2. The Trial Court Erred In Applying The "Maritime Connection" Prong of the Sisson Test.

The trial court erred, however, in evaluating both subsets of the "maritime connection" or "nexus" test. First, Mr. Jones' inhalation of asbestos aboard a nascent U.S. Navy ship did not have a "potentially disruptive impact on maritime commerce." Sisson, 497 U.S. at 363. Second, even if there was the potential for the disruption of maritime commerce, John Crane's "activity" in manufacturing asbestos-containing products without adequate warnings did not have "a substantial relationship to traditional maritime activity." Id. at 365. To be sure, Mr. Jones' exposure to asbestos as a shipyard worker was insufficient to create a maritime connection. Every federal court of appeals that has considered the issue has agreed, albeit in cases decided prior to Sisson and Grubart. See, e.g., Eagle-Picher Indus. v. United

States, 846 F.2d 888, 896 (3d Cir.), cert. denied, 488 U.S. 965 (1988); Lopez v. A.C. & S., Inc., 858 F.2d 712 (Fed. Cir. 1988); Oman v. Johns-Manville Corp., 764 F.2d 224 (4th Cir.) (en banc), cert. denied, 474 U.S. 970 (1985); Woessner v. Johns-Manville Sales Corp., 757 F.2d 634, 644 (5th Cir. 1985); Austin v. Unarco Indus., 705 F.2d 1, (1st Cir.), cert. dismissed, 463 U.S. 1247 (1983); Harville, 731 F.2d 775 (11th Cir. 1984); Myhran v. Johns-Manville Corp., 741 F.2d 1119 (9th Cir. 1984); Keene Corp. v. United States, 700 F.2d 836, 844 (2d Cir.), cert. denied, 464 U.S. 864(1983).[8]

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[8] All of these cases were decided prior to Sisson and Grubart. Therefore, they do not frame the issues in terms of "incidents" or "activities," but rather they employ various earlier tests for evaluating whether the plaintiffs claim should be decided under maritime law. The majority of them followed either a four-part test created by the Ninth Circuit, or the four-part "Kelly Test" first annunciated by the Fifth Circuit in Kelly v. Smith, 485 F.2d 520, 525 (5th Cir. 1973) (the court must consider (1) the function and roles of the parties, (2) the types of vehicles and instrumentalities involved, (3) the causation and type of injury, and (4) traditional concepts of the role of admiralty law). Although adoption of the Kelly test was considered, but rejected, by the Supreme Court in Grubart, John Crane submits the outcome in these cases — that the shipyard workers' claims had no connection to traditional maritime activities - would be the same under Grubart. Significantly, the Supreme Court has not overruled these decisions, and they are still the law in their respective jurisdictions. Moreover, this Court has not commented on them.

a. The "Incident" Of Inhaling Asbestos Fibers Aboard An Unfinished Vessel Had No Potential To Disrupt Maritime Commerce.

Under the nexus test, the Court must first "'assess the general features of the type of incident involved' to determine whether the incident has a 'potentially disruptive impact on maritime commerce.'" Grubart, 513 U.S. at 534, citing Sisson, 497 U.S. at 363-365. In describing, or assessing, the "incident" involved, a court must use an "intermediate level of possible generality," and the incident may not be described too generally or too narrowly. Id. at 538-539. In other words, the court must determine "whether the incident could be seen within a class of incidents that posed more than a fanciful risk to commercial shipping." Id. at 539, because the "primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce; Foremost, 457 U.S. at 674.

In this case, the "incident" giving rise to Plaintiffs injury should have been described in general terms as "the inhalation of asbestos fibers while installing asbestos-containing products within a U.S. Navy ship." John Crane argued to the lower court that, in a new construction setting, inhalation of asbestos has nothing more than a fanciful potential to disrupt maritime commerce. (App. pp. 132-33) See, e.g., Owens-Illinois, Inc., 698 F.2d at 970 (holding that new ship construction does not have the "maritime flavor" necessary to invoke

admiralty jurisdiction). John Crane explained that a shipyard worker's exposure to asbestos does not inevitably lead to health problems, and that the exposures here, as in most cases, occurred without any consequence to maritime commerce at the time of the incident. (App. pp. 7, 132-33) Without immediate harm, or at least a contemporaneous awareness of the deleterious nature of the exposure itself, the incident of inhaling asbestos fibers aboard an unfinished U.S. Navy ship simply does not pose a threat to traditional maritime activities. Accordingly, the first prong of the nexus test was not satisfied, and the trial court erred in finding otherwise.

b. John Crane's "Activity" Giving Rise To The Incident Did Not Have A "Substantial Relationship To Traditional Maritime Activity."

In determining the second part of the nexus test, the Court must decide whether the defendant's "activity" that caused the plaintiffs injury bore a "substantial relationship to traditional maritime activity." Grubart, 513 U.S. at 539 (holding that a tortfeasor's activity, commercial or noncommercial, on navigable waters must be "so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the suit at hand"). Defining the "activity" in a nexus analysis is separate from defining the "incident" that it caused. Grubart, 513 U.S. at 540. The "incident" is often defined by the

plaintiffs actions, or, more typically, the nature of the accident that lead to the injury. Sisson, 497 U.S. at 363 (defining the "incident" as a fire on a vessel docked at a marina on navigable waters). In contrast, the Grubart Court held that the "actions" giving rise to the incident are defined by the tortfeasor's activities that proximately caused the incident Id. at 541. These distinct, defined terms are often confused and conflated, making the jurisdictional analysis a difficult endeavor for many courts. See, Grubart, 513 U.S. at 549 (Justice Thomas and Justice Scalia concurring, but noting the substantial ambiguity and difficulties created by the Sisson two-part nexus test).

When the relationship between the tortfeasor's activity and traditional maritime concerns is too attenuated, as it was here, admiralty jurisdiction is unavailable. Grubart, 513 U.S. at 540. Contrary to Plaintiffs arguments in the lower court, this has been the analysis in the Supreme Court for decades.

For example, in Foremost, the Court focused on the activity of the tortfeasor to find that admiralty jurisdiction existed. 457 U.S. at 674-677. There, two pleasure boats collided on a navigable waterway. Id. at 669. Although both parties happened to have engaged in the same activity, it was the defendant's conduct - "the negligent operation of a vessel on navigable waters" - that the Court deemed relevant for purposes of concluding

that a sufficient connection with traditional maritime activity existed. Id. at 674-675.

Similarly, in Sisson, the Supreme Court focused on the nature of the tortfeasor's activity to conclude that the suit was substantially related to traditional maritime activity. 497 U.S. at 364-367. There, a fire erupted in the washer/dryer unit of defendant Sisson's vessel, which eventually destroyed that and several other neighboring vessels docked in the same marina. Id. at 360. After finding that the general features of the "incident" involved - a fire at a marina - had the potential to disrupt maritime activity, the Court went on to examine the second part of the nexus test. Id. at 362-364. The Court characterized the relevant "activity" as the defendant's Sisson's, "storage and maintenance of a vessel at a marina on navigable waters." Id. at 365. Importantly, in Sisson, it was the vessel owner and not the manufacturer of the washer/dryer unit that was the named defendant The washer/dryer manufacturer's activity was not addressed inthe Court's ruling.

In Grubart v. Great Lakes Dredge & Dock Co., the Supreme Court clarified its earlier holding in Sisson, and confirmed that it is the tortfeasor's activity that is the primary focus in determining whether admiralty jurisdiction lies. 513 U.S. at 541. There, Great Lakes drove pilings from its barge into the Chicago riverbed, thereby weakening the tunnel structure which the City of Chicago had not properly maintained, and causing the Chicago River to flood into tunnels and basements in downtown Chicago. Id. at 530. Thus, there were two tortfeasors at issue.

Concluding that the substantial relationship test was satisfied, the Court expressly rejected the City's argument that Sisson required the Court to consider the City's own inaction, which, because of its failure to resemble any traditional maritime activity, would take the suit out of admiralty. Id. at 540-541. In rejecting the argument, the Court reasoned that: "The city misread Sisson, however, which did not consider the activities of the washer/dryer manufacturer, who was possibly an additional tortfeasor, and whose activities were hardly maritime." Id. at 541 (emphasis added). Rather, the Grubart Court explained that it was the activities of defendant Sisson, the boat owner, that "supplied the necessary substantial relationship to traditional maritime activity" in that case, and only one tortfeasor need be connected to maritime activity. Id. Importantly, neither the washer/dryer manufacturer, nor the plaintiffs provided such relationship. Grubart, 513 U.S. at 540-541.

As in Sisson, Foremost, and Grubart, the trial court should have focused on the acts of the alleged tortfeasor, John Crane, and not those of Plaintiff in its evaluation. The wrongful activity of John Crane, and thus the relevant "activity" for purposes of the "substantial relationship" test, was the manufacture and placement of asbestos-containing gasket products into the stream of commerce, and the failure to warn of their dangers. Indeed, Plaintiff alleged that the proximate cause of Mr. Jones' death was his inhalation of asbestos dust and fibers from products manufactured by John Crane. (App. pp. 4, 6-7) Plaintiff also alleged that the products manufactured by John Crane, were inherently

dangerous and that it failed to warn Plaintiff of the danger. (App. pp. 12-13) However, these wrongs/activities had no significant connection with traditional maritime activity. Foremost, 457 U.S. at 674; Eagle-Picher Industries, Inc., 846 F.2d at 897 (observing that activities related to navigation, seaworthiness, cargo damage and maintenance and cure are traditional maritime activities).

John Crane is most closely situated to the washer/dryer manufacturer in Sisson, which the Supreme Court reasoned in Grubart undertook "activities" with absolutely no connection to traditional maritime activity. Grubart, 513 U.S. at 540-541. Therefore, just as if the plaintiffs in Sisson had brought suit solely against the washer/dryer manufacturer, or if plaintiffs in Grubart had brought suit solely against the City of Chicago, maritime law should not have been applied.

B. The Trial Court Erred In Relying Upon Garlock Sealing Technologies, LLC v. Little To Apply Maritime Law.

The trial court relied on Garlock Sealing Technologies, LLC v. Little in holding that maritime law was proper in this asbestos exposure case. (App. p. 1351) John Crane respectfully submits that this Court should reconsider its statements in Little concerning the application of maritime law to cases such as this, involving the building of a vessels.

Plaintiff has previously criticized John Crane for asking the Court to disregard stare decisis,

however, there are circumstances in which it is appropriate to reevaluate a prior decisions' rule. In Virginia, when a court of last resort has established a precedent, after full deliberation upon the issue by the court, the precedent will not be treated lightly or ignored, in the absence of flagrant error or mistake. Pulliam v. Coastal Emer. Servs., Inc., 257 Va. 1, 10, 509 S.E.2d 307, 312 (1999)). John Crane submits that, under this standard, stare decisis should not deter this Court from reversing the trial court.

In Little, the decedent had been a submarine repairman whose work included installing and replacing gaskets on submarines. His estate brought a wrongful death action against the manufacturers of the material used to create the gaskets, claiming the gasket material caused decedent's mesothelioma. Plaintiff argued that maritime law applied. Id. at 384. Defendant, Garlock, asserted in response that there was "no relationship between the alleged tort of negligent failure to warn and/or breach of warranty by an asbestos product manufacturer and traditional maritime activity." Id. at 386. The trial court agreed with the plaintiff and applied maritime law.

On appeal, this Court affirmed. Id. Citing Sisson for the proposition that "the relevant activity is determined by the general conduct from which the incident arose," the Court labeled "ship repair" - and more specifically the "installation and maintenance of... gaskets" - as the relevant "activity." Id. For the reasons already explained, John Crane respectfully submits that the Court's reasoning was incorrect, because it is the tortfeasor's, or "wrongdoer's"

activity, and not the activities of the plaintiff, that are material to the analysis. The Little opinion did not engage in a detailed analysis of the law and facts relevant to the Court's "nexus" determination. Little, 270 Va. at 386. Rather, the Court offered the statement that "[t]he installation and maintenance of these gaskets was necessary to enable the submarines to operate properly." Id. This statement reveals that the Court was focused on the "activities" of the plaintiff and the "incident" of installing the gaskets, instead of the "activity" of the tortfeasor, Garlock, that proximately caused the decedent's illness and death. That focus is where the error lies.

Essential to the Court's reasoning in Little was its finding that the United States Supreme Court has "uniformly and consistently held that ship repair is a maritime activity." Little, 270 Va. at 386, citing Robins Dry Dock & Repair Co. v. Dahl, 266 U.S. 449, 457, 45 S.Ct. 157, 158 (1925) and Great Lakes Dredge & Dock Co. v. Kierejewski, 261 U.S. 479, 480-81 43 S.Ct. 418, 418 (1923). John Crane concedes that ship repair, as distinguished from ship construction, is usually deemed a maritime activity. See, e.g., North Pacific Steamship Co. v. Hall Brothers Marine Railway & Shipbuilding Co., 249 U.S. 119, 127, 39 S. Ct. 221, 223 (1919) (repair of vessel is a maritime activity); but see, e.g., The Francis McDonald, 254 U.S. 242, 244-45, 41 S. Ct. 65, 66 (1920) (admiralty jurisdiction does not lie in cases where one furnished labor and materials to a launched, but incomplete, vessel). However, this Court in Little failed to recognize that whether "ship repair" is a maritime activity is not dispositive of the issue. Rather, the relevant activity to assess is that

of the tortfeasor, and Garlock was not in the business of ship repair.

This Court in Little also supported its holding by citation to Mizenko v. Electric Motor and Contracting Co., Inc., 244 Va. 152 (1992). But that case is distinguishable and actually supports the opposite result from that reached in Little. The plaintiff in Mizenko had been working for Metro, a shipyard. The defendant, Electric, was a subcontractor whose employees were working alongside plaintiff, injuring him. The Mizenko Court applied the second prong of the Sisson test to the shipyard, Metro, which had directed plaintiffs actions. The court did not have to distinguish between plaintiff, Metro, and Electric's actions because they were all engaged in the same activity – ship repair. In other words, the tortfeasor's activity was ship repair. Unlike Little, Mizenko was ultimately decided correctly.

Moreover, Little conflicts with at least one of this Court's prior decisions on the applicability of admiralty law. When the Court decided Matthews v. Commonwealth. 253 Va. 180, 482 S.E.2d 810 (1997), it followed Grubart and identified the relevant inquiry as "whether a tortfeasor's activity, commercial or noncommercial, on navigable waters is so closely related to activity traditionally subject to admiralty law ..." 253 Va. at 183, 482 S.E.2d at 812 (quoting Grubart at 539-40). In Matthews, the ferry passenger-plaintiff slipped on a lubricant while walking across the ship's deck. The evidence revealed that the lubricant used on the safety gates had collected in puddles on the deck, causing the

hazard that injured the passenger. In applying the nexus test, this Court did not define the relevant "activity" as plaintiffs walking on a ship's deck. Instead, it defined the relevant "activity" as the maintenance of the vessel's deck and safety gates, because that was the "activity" that the *tortfeasor* negligently performed. Thus, this Court in Matthews asked the correct question - what activity proximately caused plaintiffs injury- in reversing the trial court. Matthews is further evidence that the Little decision was flawed, and that the trial court in the instant case similarly incorrectly chose maritime law.

This case is unique to neither maritime service, nor traditional maritime activity. John Crane is a nationwide manufacturer of heat resistant packing and gasket products, some of which contained asbestos. John Crane's activity in manufacturing asbestos products had no significant connection with traditional maritime activity in and of itself, nor did it pose any feasible threat to maritime commerce in the 1960's. The relevant "activity" of the tortfeasor in this case was insufficient to satisfy the nexus test. The Little decision led the trial court to erroneously apply the maritime standard of care where Virginia's law should have been followed. This constituted reversible error, and a new trial under Virginia law should be ordered.

CONCLUSION

For the foregoing reasons, John Crane Inc. respectfully requests that this Court vacate the

judgment of the trial court entered on July 26, 2006, and amended on August 14, 2006, order that a new trial be conducted consistent with the arguments presented herein, or, alternatively, that Plaintiff be ordered to release the excess amount of the verdict, or submit to a new trial on damages alone.

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By Counsel

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